149-461
94-465

Office Supreme Court U. S.
FILED.
DEC 9 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS,
Plaintiff in Error,
v.
THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.
No. 13645.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

DICKSON & SMITH,
Attorneys for Defendant in Error.

CHARLES W. WELLS,
WILLARD BROWN,
GEORGE H. FEARONS,
Of Counsel.

A. R. FLEMING & CO., PRINTERS, 522 N. Third St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS,
Plaintiff in Error,
v.
THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.
No. 13645.

STATEMENT.

The facts in the present case are substantially agreed upon.

The answer admits the passage of the ordinances set forth in the petition, as therein alleged.

The agreed statement of facts admits that defendant, from the first day of July, 1884, up to the institution of this suit, has had, held, owned and used, in the streets, alleys and public places of the city, 1,509 telegraph poles, of which, 1,050 were in the side-walks of said city; that all the poles were erected prior to the first day of July, 1884; and that defendant was not, between said 1st of July, 1884, and the institution of this suit, taxed on its gross income for city purposes.

That defendant, since the 24th day of July, 1866, has been a corporation organized under the laws of New York, and a citizen of that State.

That during all the times mentioned in the petition defendant has owned, etc., lines of telegraph in various parts of the United States and in the City of St. Louis; that said lines run over and under the river adjoining the city; and from, into and through the city to other States and Territories, and connect at Washington with those owned by the United States; that defendant is in close connection with other telegraph companies doing business in the United States and foreign countries.

That defendant, on the 5th of June, 1867, accepted the provisions of the act of Congress of July 24th, 1866, entitled: "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes;" and that said acceptance has never been withdrawn.

That defendant, since the filing of said acceptance, has transmitted to, and does constantly transmit from, into and through the City of St. Louis, telegrams between the departments and officers of the United States on governmental business, at rates fixed annually by the Postmaster-General of the United States, and also telegrams for and between persons residing in the United States and foreign countries.

That defendant has at all times fully complied with all the requirements and provisions of ordinance No. 11,604, of the City of St. Louis; and of the provisions of said ordinance incorporated in the revised ordinances of 1887.

That defendant has paid all general taxes assessed by the city and State for 1884, 1885, 1886, 1887.

It was proved that all of the streets of the City of St. Louis are established letter carrier routes, and, therefore, post roads, under section 3964, Rev. Stat. U. S. (R. p. 29).

There was a slight conflict of testimony with respect to the extent to which the wires of defendant interfere with the working of the fire department in the city; but the testimony shows that defendant's wires are not in the least dangerous to life, and interfere with the department only in so far that occasionally they have to be cut.

We believe the testimony on this point to be wholly immaterial to the inquiries involved in the case.

POINTS.

1. The present action cannot be maintained, as it is in the nature of debt, and is brought to recover a charge imposed by a city ordinance, which prescribes the method of its enforcement to be by prosecution as for a misdemeanor.

2. Ordinance 12,733 impairs the obligation of the contract between the city and defendant, created by ordinance 11,604, and its acceptance, and is void.

3. Plaintiff was without authority in law to enact sections 11, 12, 13 and 14, of ordinance 12,733, and sections 671, 672, 673 and 674, of article 8, chapter 15, revised ordinances of 1887, set forth in the petition; and said sections of said ordinance 12,733, and of said revised ordinances, are illegal and void, as in contravention of the constitution and laws of the State of Missouri and of the United States.

4. Defendant, on the 5th day of June, 1867, accepted the provisions of the act of congress, of July 24th, 1866; and by virtue of such acceptance acquired the right to erect and maintain its line of telegraph along the post roads of the United States; that its poles are erected and used in and along the post roads of the United States in said City of St. Louis; that defendant has continuously, since prior to 1884, been a government agent and an instrument of foreign and interstate commerce; that the amount fixed by said ordinance as compensation for the privilege of using said streets, alleys and public places, is in fact a privilege or license tax on defendant for carrying on its business in said

City of St. Louis; that the attempted enforcement and collection of said charge is, therefore, in violation of the provisions of article one, section eight, paragraphs three and seven, of the constitution of the United States; and of the laws of said United States; and said ordinances, in so far as the same require the payment by defendant of said sum, are in contravention of said constitution and laws.

5. The ordinances under which plaintiff seeks to recover are unreasonable, oppressive and unjust, and consequently void.

Plaintiff seeks to recover the sum of $7,545 for each of the three years, July 1st, 1884 to July 1st, 1887.

If the ordinances imposing the charge are valid, the amount *now* owing by defendant to the city will exceed the sum of $70,000. In view, therefore, of the great importance to defendant of the questions involved, and the burden being upon defendant to establish the invalidity of the ordinances, we shall consider not only the principles of law respecting the form of action, and those with which we believe the ordinances in question are in direct conflict, but also all the sources from which it can possibly be claimed the power to enact such ordinances can be drawn.

BRIEF AND ARGUMENT.

I.

The petition does not state facts sufficient to constitute a cause of action, and this defect was not cured by the evidence. Defendant presented this objection in the form of a declaration of law, asked at the close of plaintiff's case.

Although plaintiff alleges in its petition that defendant is "indebted" to it in the sum sought to be recovered, the action is clearly not an action of debt; there is no allegation of promise to pay, express or implied: and the cause of action does not arise out of contract.

The action is, in fact, to recover a *license tax*. The St. Louis Court of Appeals, in State *ex rel.* v. Flad, 23 Mo. App. 188, speaking of ordinance 12,733, under which the charge under consideration was imposed, say: "Ordinance 12,733 relates merely to the *license tax* required to be paid by telephone companies." * * *

Whether such *license tax* can be sustained under the revenue power of the city, or power of police regulation, will be considered under another head. That it cannot be enforced in the present form of action has been expressly decided.

The Supreme Court of Missouri, in the City of Carondelet v. Picot, 38 Mo. 130, has determined that a municipal corporation cannot provide for the collection of taxes by a suit against the tax-payer, unless the power be specifically delegated by its charter. The court say: "There is no question made here as to the legality of "the assessment of the special tax, but it is objected

"that there is no right to sue *by personal action*. The "levying of taxes is a matter solely of statutory creation, "and no means can be resorted to to coerce their pay- "ment, other than those pointed out in the statute. "* * * Unless the power is specifically delegated "or expressed, no right of action exists for taxes, and "they cannot be turned into judgments. Both the State "and municipal corporations have a much better and "more expeditious remedy."

City of St. Louis v. Allen, 53 Mo. 44,
State *ex rel.* v. Goodnow, 80 Mo. 271.

In Lane Co. v. Oregon, 7 Wall. 71, this court quote with approval, from Shaw v. Pickett, 26 Vt. 486: "The assessment of taxes does not create a debt that "can be enforced by suit, or upon which a promise to "pay interest can be implied. It is a proceeding *in* "*invitum*." And from City v. Allen, 2 Dutcher, 398: "A tax, in its essential characteristics, is not a debt, "nor in the nature of a debt. A tax is an impost levied "by authority of government upon its citizens or sub- "jects, for the support of the State. It is not founded "on contract or agreement. It operates *in invitum*. "A debt is a sum of money due by certain and express "agreement. It originates in, and is founded upon, "contracts express or implied."

The Supreme Court of Louisiana, in the case of City of N. O. v. Great South. Telephone & Telegraph Co., 40 La. An. 41, which involved the validity of an ordinance, imposing a five dollar per annum charge on each pole of the defendant in that case, for the privilege of using the streets, such privilege having been previously given by the State and the city for a consideration, decided that such a charge could not be sustained as an

exercise of the taxing power, or of the police power; *and that a petition which sought to recover a money judgment for such charge would set forth no cause of action.*

In the case of Santa Cruz v. S. C. R. R., 56 Cal. 144, an ordinance of the city required that a license tax of $25 per annum be paid to the city on each railroad passenger car moved by steam in the city. The action was a complaint at law, alleging that defendant was in the business of conveying passengers in passenger railroad cars moved by steam, etc., and had not taken out licenses or "paid said license tax or fee." The prayer was for a money judgment. The court held that the action could not be maintained, and said: "But we know of no legal principle which would enable "us to assume that defendant had by implication agreed "to pay the amount of a license tax without taking out "a license. If it is liable for the sum required to be "paid for a license *now*, by virtue of an implied prom- "ise, it has been liable in the same manner ever since "it commenced to do business. While during the same "period its agents have been liable to punishment, as- "suming the ordinance to have provided a punishment, "because defendant had neglected to take out a license "and pay the fee in advance of doing the prescribed "business. No officer of the city was authorized to "permit the defendant to do business on trust, and its "promise that it would take out a license.

"The difference between the present and an action "to recover a specific fine or penalty is manifest. The "person carrying on a business for which a license is "required, cannot be compelled to take out a license. "If he neglects, or refuses to do so, he may be sub- "jected to a criminal prosecution, or he may be held

"to have agreed to pay a specific penalty instead of the "amount of the license tax; but he certainly owes noth- "ing for a license until he has taken out a license."

Cooley on Taxation, pp. 15 and 435, and cases cited.

Sec. 4, Art. v, of the charter of St. Louis (R. S. Mo. 1879, p. 1600), requires the Municipal Assembly to fix the penalty for neglect to pay taxes, licenses, etc. This has been done with respect to the license tax in question, by section 14, of ordinance 12,733; and consequently is the exclusive remedy of the city for its enforcement.

II

Ordinance 11,604 granted defendant authority to set its poles in the streets of the city without any limitation as to time, for valuable considerations stipulated; and having been accepted and acted on by defendant, and all of its conditions complied with, and the city having acquired valuable rights and priveleges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of defendant; nor can it impose new and burdensome considerations.

Ordinance 11,604 was passed February 25th, 1881, and remained in force in its original form until June 20th, 1887, when, without substantial change of terms, it passed into the revised ordinances. The only powers reserved in the ordinance relate to change of location of poles, etc. The agreed statement admits full

compliance by defendant with all its terms. The evidence shows that the city has availed itself of the privileges granted it by defendant's written agreement of acceptance; and since the passage of the ordinance has used the property of defendant as its own, wholly without charge; that it is using 834 of the 1,509 poles in controversy for its wires, and fire and "hoodlum" signal boxes; and in some instances has as many as eight wires on one pole. (R. p. 41.) That the actual cost to defendant of erecting and maintaining the 1,509 poles and wires thereon, for *labor alone*, has always exceeded $10,900 per annum. (R. p. 44.) The city, then, by contract, has already saved the investment of the large sum nececssary to erect 834 poles, the time, etc., of erection, the cost of maintenance for eight years; and will enjoy the same benefits in the future. And the value of these benefits and privileges is in nowise lessened by the fact that defendant uses between 100 and 200 of the city's poles. *The city's right is a contract right.* The use of the city's poles by defendant is in no way connected with the contract; but an independent license.

No question is or can be raised as to the validity of the contract made by ordinance 11,604 and its acceptance. While the right of defendant to erect and maintain its poles in the streets is not dependent upon the consent of the city, yet the right given the city by statute to prescribe where the poles shall be located, etc., has never been questioned. Under the contract, the city having the right to use defendant's poles, can give it location on streets which it could not otherwise use;

as, but for such right, they would be occupied by the city. So the benefits and advantages are mutual.

Under these facts, we submit, the city is bound by the contract, and cannot, without defendant's consent, impose the charge in controversy.

The rule of law we invoke is familiar, and has passed into the text-books (Dillon on Mun. Corp., 3d Ed., §472). And it has been applied as decisive, in a case by no means as strong as the present.

In the City of New Orleans v. Great South. Tel. & Tel. Co., *supra*, the company was a local corporation, and the right was given it by the city to construct its lines along the streets, in consideration of its giving the city free telephonic service. After the construction of its lines and acceptance of the terms imposed by the city, the latter passed an ordinance,—requiring the company to pay $5 per pole per annum, for the privilege of using the streets, etc.—in substantially the language used in ordinance 12,733 under consideration.

The Supreme Court of Louisiana, denying the right of the city to impose the charge, say:

"The only remaining question is whether, after "granting the defendant authority to construct and to "maintain its lines, without limitation as to time, and "with no other consideration than the furnishing of "certain free telephonic facilities to the city, after the "defendant has, at great expense, established its plant "and constructed its lines, and when it has fully com- "plied with all the conditions imposed, the city can now "exact this large additional consideration for the con- "tinued enjoyment of privileges already granted. If "the city can do this now, she could have done it the

"very day after the defendant had completed its lines, "when it had incurred all the expense, and before it had "reaped a particle of return. If she can impose a "charge of $5 per pole, she can, with equal power, "impose one of $1,000, and, for that matter, she could "arbitrarily revoke the grant at her pleasure. Either "she is bound according to the terms of her proposition, "accepted and acted on by defendant, or she is not bound "at all. Obviously, upon the clearest considerations of "law and justice, the grant of authority to defendant, "when accepted and acted upon, became an irrevocable "contract, and the city is powerless to set it aside, or "to interpolate new or more onerous considerations "therein. Such has been the well-recognized doctrine "of the authorities since the *Dartmouth College Case*, "4 Wheat. 518."

People *ex rel.* v. West. Div. Ry. Co., 118 Ill. 113, holds that where an ordinance of a city, granting a railway company a right to construct and operate a track on a portion of the street upon certain conditions, has been accepted, so that the ordinance as accepted constitutes a contract, the rights of the contracting parties will be governed by such ordinance, and the city authorities will be powerless to impose new and further conditions and burdens upon the company without its consent.

The case of Com. v. New Bedford Bridge, 2 Gray, 339, involved an act of the legislature authorizing the erection of a bridge, which prescribed that the draws should be at least thirty feet in width. The act was accepted, and draws of the prescribed width constructed. Subsequently, the leglislature passed an act requiring the bridge to maintain draws of greater width. The

court held the first act and its acceptance constituted a contract which could not be affected by the subsequent act, and say: "Upon familiar and well-settled principles the act, when accepted by defendants, was an executed contract between them and the Government, by the terms of which, as contained in the charter, both parties are equally bound. The defendants cannot, without the consent of the legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act; nor can the legislature, without the assent of the defendants, in any way affect or impair the original terms of the charter, by annexing new conditions or imposing additional duties, onerous in their nature or inconsistent with a reasonable construction of the compact."

Coast Line R. R. Co. v. Savannah, 30 Fed. Rep. 646;
Chicago v. Sheldon, 9 Wallace, 50;
City of Quincy v. Bull, 106 Ill. 342;
Kansas City v. Corrigan, 86 Mo. 67;
Fletcher v. Peck, 6 Cranch, 87;
The Binghampton Bridge, 3 Wall. 51;
Morawetz on Corp. (2d Ed.), §1058.

III.

The ordinance under which the plaintiff seeks to recover is one for purpose of revenue; and the sum which defendant is by the terms of the ordinance required to pay, is of the nature of a license tax upon defendant for the privilege of carrying on its business in the City of St. Louis.

(*a.*) The evidence clearly establishes the object of the ordinance to be the raising of revenue; as the expense to the city of *regulating* the erection and use by defendant of its poles in the streets, sidewalks and other public places is, as the evidence shows, probably less than $200 per annum. Ordinance 12,733 also shows upon its face the object of its creation. If revenue was not that object, why except companies *taxed on their gross incomes?*

The City of St. Louis v. Green, 7 Mo. App. 474, was a case involving the validity of an ordinance imposing a license tax upon vehicles using the streets of St. Louis. The court say (p. 473): "*Every burden imposed for revenue purposes is levied under the taxing power, by whatever name the tax is called.*"

And (p. 474): "The substance, not the form of the "tax, is to be regarded in ascertaing whether the tax is "upon property, or upon a privilege connected with "property. The tax under consideration is a license "tax. The imposition of such a tax may be referred "to the taxing power, or to the police power of the "State, to either, or to both; to the police power "alone, if the object is merely to regulate, *and the "amount received merely pays the expenses of enforc-"ing the regulations, and to the taxing power alone if "its main object is revenue.*" (p. 477.) "It is appar-"ently, in the case before us, an exaction with a view "of revenue. (p. 478.) The tax, then, is not a tax "upon the carriage as property, but upon the right to "use the carriage on the streets of the municipality im-"posing it. And though imposed for revenue, and not "for police purposes at all, it is a tax of the nature of a "license, because it is a permission to do that which,

"after the passage of the ordinance, it becomes unlaw-
"ful to do without having obtained the permission."

The language of Judge Bakewell in City v. Green, quoted, was adopted by the Supreme Court as a correct exposition of the law, in the same case on appeal.

City v. Green, 70 Mo. 564.

See also:

St. Louis v. Spiegel, 75 Mo. 143.
Knox v. Thompson, 19 Mo. App. 523.
State *ex rel.* v. Flad, 23 Mo. App. 188.
Mayor v. Second Ave. R. R., 32 N. Y. 261.
North Hudson Co. v. Hoboken, 12 Vroom, 72.
Burroughs on Taxation, p. 69.
Dillon on Mun. Corp. (2d Ed.), §609.

"Every burden which a State imposes upon its citizens, with a view to revenue either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of tax or under some other designation."

Cooley Const. Lim., Sec. 496.

(*b.*) The agreed statement of facts, and exhibits accompanying it, show that defendant has paid all taxes assessed against it for State and municipal purposes, under the general revenue laws of the State, during the entire period mentioned in the petition. We do not understand, it is claimed, that the $5 charge, which the city seeks to impose upon each pole is a tax upon *property of defendant.* If such claim was made,

it would be met by Sec. 6,901, of the R. S. Mo., which prescribes the manner in which the real and personal property, including franchises of telegraph companies, shall be taxed for State, municipal, and local purposes.

If the charge, as we have endeavored to show, is in fact for revenue purposes, and, therefore, a tax, it must be a tax on some "privilege connected with property," and hence a tax upon defendant, for the privilege of using its poles, by means of which its business is transacted, in the streets of the city; and it is, therefore, a tax upon defendant for the privilege of carrying on its *business* in the city.

Express power is given the city by the fifth paragraph of section 26, article III, of the scheme and charter of St. Louis, (R. S. Mo. 1879, p. 1586), "to license, tax and regulate * * * * telegraph companies or corporations." If the power of the city to impose the charge in question is dependent upon expressly delegated authority, it must be found in the paragraph mentioned. This provision, so far at least as the power to *tax* is concerned, we shall endeavor to hereafter show, has been repealed by the act of April 21st, 1877. (Sec. 6901, Rev. Stat. Mo. 1879.) The power to "license and regulate" remains. The city knew, when the ordinance in question was passed, that the State possessed no power to exact or permit a municipality to exact a license fee or tax from defendant for the privilege of carrying on its business, and that, if it styled the amount sought to be imposed a license tax for carrying on such business, such tax would be, under the repeated decisions of this court, in contraven-

tion of the Constitution and certain laws of the United States. It sought, therefore, to evade the effect of those decisions, by charging the sum fixed as "for the privilege of using the streets," etc.

This evasion, however, will not change the true character of the charge: In the Passenger Cases, 7 How. 458, the Supreme Court say: "It is a just and "well-settled doctrine, established by this court, that "a State cannot do that indirectly which she is forbid-"den by the Constitution to do directly. If she cannot "levy a duty or tax from the master or owner of a "vessel engaged in commerce, graduated on the ton-"nage or admeasurement of the vessel, she cannot "effect the same purpose by merely changing the ratio "and graduating it on the number of masts, or of "marines, the size and power of the steam engine, or "of the number of passengers which she carries. We "have to deal with things, and we cannot change them "by changing their names. Can a State levy a duty "on vessels engaged in commerce, and not owned by "her own citizens, by changing its name from a 'duty "on tonnage' to a tax on the master; or an impost "upon imports by calling it a charge on the owner or "supercargo, and justify this evasion of a great prin-"ciple by producing a dictionary or a dictum to prove "that a ship captain is not a vessel, nor a supercargo an "import?"

By Sec. 14, of ordinance 12,733, the failure or refusal of defendant to pay the $5 charge for the privilege of maintaining, etc., its poles in the streets, is made a misdemeanor, punishable by a large fine for each day's default. If the charge was properly imposed, the business carried on by defendant in St. Louis, without its payment, has been illegal. (Cooley

on Taxation, p. 385.) And if illegal, the city must have had the power to forbid such business being carried on. For, says Mr. Justice Matthews, in Pullman Car Co. v. Nolan, 22 Fed. Rep. 276: "The question of the right to impose a tax as a condition of the *exercise of the privilege* resolves itself into the broader question of the right to prohibit it altogether; for, that which the legislature may license it may forbid. Indeed, it is forbidden, unless it is licensed."

IV.

The city had no authority in law to enact sections 11, 12, 13 and 14, of ordinance numbered 12,733, or sections 671, 672, 673 and 674, of article 8, chapter 15, Revised Ordinances of 1887.

(*a.*) Ordinance 12,733 is supplementary to ordinance 11,604. It is the original ordinance imposing the $5 charge, and was in force from March 22d, 1884, the date of its approval, to April 12th, 1887, when it was incorporated in the Revised Ordinances of 1887, and became the sections mentioned.

The present Constitution of the State of Missouri, and the "Scheme and Charter," are the original sources from which the City of St. Louis, after the adoption of the latter, on the 22d day of August, 1876, derived its power of taxation.

Section 23, of article IX, of the Constitution of Missouri, provides, that the charter of the City of St. Louis ("Scheme and Charter"), and all its amendments, shall be always in harmony with, and subject to, the constitution and laws of Missouri; except only, that pro-

visions may be made for the graduation of the rate of taxation for city purposes in the portions of the city which are added thereto by the proposed enlargement of its boundaries.

Section 25, of the same article, gives the General Assembly the same power over St. Louis as over other cities and counties of the State.

Section 11, of article x, provides: "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes." * * *

The following are the provisions of the charter of St. Louis, from which must be drawn the power of the city to pass an ordinance of the character of that under consideration.

Section 26, article III (R. S. Mo. 1879, p. 1585): "The mayor and assembly shall have power within the city, by ordinances not inconsistent with the constitution or any law of this State or of this charter:

1st. "To assess, levy and collect all taxes, for general and special purposes, on real and personal property and licenses. * * *

2d. * * * "To construct and keep in repair all bridges, streets, sewers and drains, and to *regulate* the use thereof. * * *

5th. "To license, tax and regulate * * * telegraph companies or corporations, * * * and all other business, trades, avocations or professions whatever."

14th. Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city. * * *

Section 1, article v: "For the support of the gov-"ernment of the city, the improvement thereof, and "the payment of the public debt, the municipal as-"sembly shall by ordinance annually levy and collect "taxes on all subjects and objects of taxation, and all "property within the city made taxable by law for "State purposes, and shall establish the rates thereof "as follows:" * * * * * *

Sec. 4, Art. v: "The assembly shall also provide "by ordinance for the levy and collection of all other "taxes, licenses, wharfages, and other dues of every "description, and to fix the penalties for neglect or re-"fusal to pay the same according to law and ordi-"nance."

On April 21st, 1877, subsequent to the adoption of the "Scheme and Charter," an act of the legislature was passed prescribing the mode of taxing all telegraph companies in the State. This act has ever since been in force, and is Sec. 6901 *et seq.*, R. S. Mo., 1879. The mode of taxation of the property of defendant, real and personal, including franchises, for "State, county, municipal and other local purposes," by Board of Equalization, having same powers as in railroad assessment, is prescribed. Such mode is exclusive of all other modes of taxing telegraph corporations, and the act of April 21st, 1877, repealed all the charter provisions mentioned respecting the taxation of telegraph companies.

In the case of the State vs. Severance, 55 Mo. 378, the Supreme Court of Missouri was called to pass upon the precise question now under consideration. The charter of the City of St. Joseph gave it the power to tax railroad companies. Subsequent to the granting of the charter the legislature of the State passed a general law creating a State Board of Equalization, and vesting in such board the assessment of all railroad property within the city, for State, county and municipal taxation.

The court in that case say:

"It is now contended that this law, general in its "character, does not apply to the City of St. Joseph, "whose charter, passed prior thereto, gave it express "power to tax the property of railroad companies "within the corporate limits. There is no question "concerning the now generally admitted rule, that the "general affirmative statute will not repeal a former "one, which is special or particular in its nature, un-"less negative words are used, or the acts be so en-"tirely inconsistent that they cannot stand together. "In such cases there is nothing but an implication of "repeal, and repeals in that manner are not favored. "But it is really a question of intention, and where "the legislative intent is manifest, or apparent, it must "prevail. The statute says, that all railroads now con-"structed, in course of construction, or which shall here-"after be constructed, and all other property, real, per-"sonal or mixed, owned by any railroad company or "corporation, shall be subject to taxation for State, "county, or other municipal or local purposes. A "Board of Equalization is then organized, with full and "complete power to assess the roads and all their "property. Not only does the board complete and

"ascertain the value in their assessment, but it is made "their duty, when the assessment is arrived at, to ap- "portion the value of all lands, work-shops, depots, "and other buildings belonging to each railroad com- "pany, to the counties, cities or incorporated towns in "which such property is situated. If it were intended "that the cities and towns should still have the priv- "ilege and power of again assessing the property "under their municipal ordinances, for what purpose "was the law enacted? The provision apportioning "the lands, work-shops, depots and other buildings, to "the municipalities, under such a construction would "be a mere nullity, and amount to nothing more than "unmeaning verbiage. We must suppose, that the "legislature meant something, and that they intended "what they said, and that, therefore, all the property "was to be assessed by the board, and that they were "to ascertain the value within the limits of any city, "and transmit that amount as the proper assessment "in favor of the city, and that their action in this re- "gard was exclusive of all other officers, either State "or municipal. This construction is obvious, else the "act has no efficacy."

Pacffic R. R. v. Watson, 61, Mo. 57.
State v. Han. & St. Joe R. R., 87 Mo. 239.

(*b*) The charter power to "license and regulate" telegraph companies remains.

The ordinance gives no name to the burden it imposes. The Supreme Court of Louisiana, in the case of New Orleans v. Telegraph Co., *supra*, declares that a charge, such as that made by the ordinance under consideration, is neither a tax on property nor license tax; but inasmuch as attempt may be made to sustain it under the power to "license," we shall briefly

consider the extent of, and limitations upon, that power.

The evidence shows that the poles mentioned in the petition were all erected prior to the passage of ordinance 12,733.

By the act of November 17th, 1855, Vol. 2, R. S. Mo., 1855, page 1520, *every* corporation, owner or association, engaged in telegraphing by electricity in Missouri, was given the right to construct lines of electric telegraph upon and along any of the highways and public roads, and across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the wires, etc.

By the revision of 1865, chapter 65, page 349, section 5, it is provided: "Companies organized under the provisions of this chapter, for the purpose of constructing and maintaining electric telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures, along, upon and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters."

The last section, as section 879, R. S. Mo., 1879, was in force when the present action was brought in the exact language quoted, excepting that the word "telephone" is inserted before the word "telegraph."

The revisions of 1865 and 1879 do not in terms give the right mentioned to companies already licensed by the Federal Government, as such grant was unnecessary; but read in their entirety, the provisions giving

cities the right to prescribe where the poles of "any telegraph company," etc., shall be set, show the Legislature's recognition of the superior grant of the Government.

So that the privilege of erecting and maintaining poles and wires *along and upon* the highways of the city has been given defendant by the State, and is in no way dependent upon the consent of the city; and defendant is, so far as that privilege is concerned, a direct licensee of the State. As this privilege was given thirty years before the passage of ordinance 12,733, and has practically remained in force to this day, it will hardly be contended that the general charter power to "license" will authorize the city to exact compensation for the exercise of such privilege, granted by superior authority, and in no wise dependent upon its consent.

The case of A. & P. R. R. Co. vs. St. Louis, 66 Mo., p. 256, is directly in point. The proceeding was for injunction against the city, to restrain it from interfering with a railroad company's track laid on Poplar street, in St. Louis. The right to lay the track was granted to the company's lessor by its charter. The decision in that case establishes the paramount authority of the legislature over the streets of the city, and the absolute lack of power on the part of the city to place any restraint or burden upon a privilege, in connection with such streets, granted to a public enterprise by the State.

The court, through Henry, J., say:

"The assent of the city was not necessary to perfect

"the right which the company required by the act of "the General Assembly to lay this track along the "street. The State has *absolute control of the streets "in cities and other public highways*, and the city has "no authority, unless it be conferred by the legislature, "to authorize the use of any street within its limits for "the construction and operation of a railroad to be "traversed by a locomotive worked by steam. (Dil- "lon on Mun. Corp., Secs. 575, 578, 579.) And, said "the Court of Appeals in this case, "streets, in incor- "porated cities and other public highways, are subject "to the paramount authority of the legislature in the "regulation of their use.

"Did the acceptance of the privilege from the city "to lay the track estop the company from claiming the "right to lay it under the act of the General Assembly? "The ordinance was a nullity. The city undertook to "grant a franchise which it had no authority whatever "to dispose of. Upon its face the ordinance was null "and void. The company received nothing from the "city as a consideration for relinquishing or waiv- "ing the privilege granted by the General Assembly. "The theory upon which railroad companies have been "incorporated, with power to condemn private property "for rights-of-way, is that they are public, not private, "enterprises—that the public has an interest in their "construction and operation, and that the public wel- "fare demands them.

"Some courts have even gone so far as to hold that "they can be compelled by *mandamus* to build them. "The rights of the city in its streets, and the control "which the legislature has over them, are matters of "which the courts will take judicial notice. The city "ordinance conferred no right, and could impose *no*

"*obligation, upon the company inconsistent with or "impairing the franchise granted by the State.*"

State *et al.* v. Mayor of Newark, 8 Atlantic Rep. 128.

Furthermore, it is elemental that a city is limited in matters of taxation to the powers delegated to it by its charter, and any exercise of those powers must be strictly in accordance with the grant. Paragraph 5, Sec. 26, Art. III, of the charter, delegates the right to license a telegraph company only *as a "business."*

(*c.*) The sole power which the city possesses to interfere with or *regulate* the privilege granted defendant by the State to construct and maintain its poles and wires as mentioned, is contained in Sec. 888, R. S. Mo., 1879, and relates exclusively to three subjects: 1st. The *place where* the posts, piers or abutments shall be located. 2d. The *kind* of posts that shall be used. 3d. The *height* at which the wires shall be run.

State *ex rel.* v. Flad, 23 Mo. App. 186;
Hannibal v. M. & K. Tel. Co., 31 Mo. App. 23;
City of St. Louis v. Bell Tel. Co., 96 M. 623.

Under this limitation of power, any license which the city might exact must relate to the subjects mentioned; and under the law in most of the States in which the matter has been considered, including Missouri, the only charge that can be made for a license authorized under the power of regulation, is the cost of issuing it, and the expense of inspecting and regulating the business licensed.

City v. St. Louis & B. Ins. & Tr. Co., 47 Mo. 150.
Cooley's Const. Lim. (2d Ed.) *586.
Cooley on Taxation (2d Ed.) pp. 597–8.
Dillon on Mun. Corp. (2d Ed.) §§291 and 2.
3 Ala. 137; 33 N. J. 280; 1 Ohio (N. S.) 218; 15 Ohio, 625.

The cost to the city of regulating defendant's business, as shown by the evidence, is simply the clerical work of making out occasional permits and the services of an inspector, who does all the "inspecting and regulating" of all telegraph, telephone, electric light and messenger companies in the city, at an annual salary of $1,000. And in performing this service, as to 834 of defendant's 1,509 poles, *the service is rendered for the joint benefit of the city and defendant.*

(*d.*) Nor can the ordinance be sustained under the rule of law which permits a municipality, "*thereunto authorized by the State* which created it, to demand from those engaged in commerce just compensation for the use of wharfs, or other artificial facilities, provided and maintained at its expense."

Packet Co. v. St. Louis, 100 U. S. 428.
Packet Co. v. Catletsburg, 105 U. S. 59.

The City of St. Louis possesses no powers, except such as are expressly or by necessary implication granted in the instrument of its creation.

Knox v. Thompson, 19 Mo. App. 523.

Nowhere in the charter of St. Louis, or any subsequent law, can direct and express authority be found for the imposition of the charge under consideration.

It cannot be "necessarily implied," because the charge is a restriction or burden upon a privilege granted by the State; and the ordinance imposing it is in direct conflict with the laws of the State. And it cannot be sustained under the "general welfare" clause of the charter.

Dill. on Mun. Corp. (2d Ed.) §250; (3d Ed.) §§315 and 316.

The sidewalks, in which more than two-thirds of defendant's poles are erected, are "artificial facilities;" but, as will be shown hereafter, they are not "provided and maintained" at the city's expense.

In the case of Transportation Co. v. Parkersburg, 107 U. S. 691, the Supreme Court explains fully the character of subjects to which the rule quoted from Packet Co. v. St. Louis, 100 U. S. 428, applies, and decides that it has no application "to that class of subjects which are in their nature national, requiring a single uniform rule."

There are additional reasons why the principle of law under consideration does not apply to the present case; but they will be more properly considered under succeeding points.

V.

The ordinances in question are in conflict with article I, section 8, paragraphs 3 and 7, of the constitution of the United States; and the act of Congress,

approved the 14th of July, 1866, entitled: "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes (now Sec. 5263, et seq., R. S. U. S.), and consequently void.

Paragraph 3, of the section mentioned, gives Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Paragraph 7: "To establish post offices and post roads."

By paragraph 2, of Art. VI, of the constitution, the constitution, and laws made in pursuance thereof, are the supreme law of the land.

By section 1, of said act of Congress, any telegraph company organized under the laws of any State in the Union, it is declared, "shall have the right to construct, "maintain and operate lines of telegraph through and "over any portion of the public domain of the United "States, and over and along any of the military and "*post roads* of the United States, which have been or "may hereafter be declared such by an act of Congress, "and over, under, or across the navigable streams and "waters of the United States."

By section 2, of said act, it is declared that telegraphic communications between the several departments of the Government, and their officers and agents, shall have priority over all other messages, and are to be sent at rates to be annually fixed by the Postmaster-General.

Section 3 prohibits the transfer of the privileges in the act granted, and provides that, at any time after

July 24th, 1871, for postal, military, or other purposes, the Government may purchase the plant of such companies, upon a valuation to be ascertained by appraisers mutually chosen.

And by the act a penalty is imposed upon such companies, should they fail to perform the services for the Government which they assume to perform by their acceptance of the provisions of the act.

By the act of March 1st, 1884 (23 Statutes at Large, p. 3): "All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

And by Sec. 3964, Rev. Stat. U. S.: "The following are established post roads. * * * * All letter carrier routes established in any city or town for the collection and delivery of mail matters."

The agreed statement of facts admits that defendant has accepted the provisions of the act of Congress of July 14th, 1866, and for many years has possessed, and now possesses, all the rights and privileges conferred by, and is subject to all the obligations and restrictions arising from, such acceptance. Its right, therefore, to erect and maintain its lines of telegraph upon and along the streets of the city, has been directly conferred by act of Congress. This court has determined this privilege to have been rightfully given; and that, so far as a State or one of its divisions is concerned, such privilege is subject only to proper police regulations for its exercise. This court has also decided that defendant is an instrument of interstate commerce, and that no State or municipality has the power to

exact a tax as a condition of its right to do business, or to impose any tax or other burden which impedes or interferes with the fullest enjoyment of the rights and privileges expressly conferred upon it, or which, as a Government agent and instrument of interstate commerce, it enjoys.

In the case of Telegraph Company v. Texas, 105 U. S., p. 460, the court say:

"A telegraph company occupies the same relation "to commerce as a carrier of messages that a railroad "company does as a carrier of goods. Both compa- "nies are *instruments of commerce, and their business "is commerce itself.* * * * *

"Congress, to facilitate the erection of telegraph "lines, has authorized the use of the public domain, "and the military and post roads, for that purpose. "As a return for this privilege those who avail them- "selves of it are bound to give the United States prece- "dence in the use of their lines for public business, at "rates to be fixed by the Postmaster-General. *Thus, "as to Government business, companies of this class "become Government agencies.*

"The Western Union Telegraph Company, having "accepted the restrictions and obligations of this pro- "vision by Congress, occupies in Texas the position of "an instrument of foreign and interstate commerce, "*and of a Government agent for the transmission "of messages on public business.*"

Wabash Railway v. State of Ill., 118 U. S. 557.
W. U. Tel. Co. v. Pendleton, 122 U. S. 356.
Railroad Co. v. Peniston, 18 Wall 5.

The act of Congress of July 24th, 1866, is a legitimate regulation of commercial intercourse among the

States, and is appropriate legislation to carry into execution the powers of Congress over the postal service, and is not limited to such military or post roads as are upon the public domain.

Tel. Co. v. Tel. Co., 96 U. S. 11.

The case of Leloup v. Port of Mobile, 127 U. S. 640, squarely determined the questions now under consideration. The decision in that case denies the right of a State or municipality to impose any burden upon the Western Union Company by way of a tax, excepting taxes upon property such as are borne equally by other citizens. The action was brought by the Port of Mobile, a municipal corporation, against the Western Union Telegraph Company, to recover a penalty imposed upon the agent of the company at that place, for the violation of an ordinance, requiring telegraph companies to pay an annual license tax of $225. The court say:

"The question is squarely presented to us, therefore, "whether a State, as a condition of doing business "within its jurisdiction, may exact a license tax from a "telegraph company, a large part of whose business is "the transmission of messages from one State to an- "other, and between the United States and foreign "countries, and which is invested with the powers and "priviliges conferred by the act of Congress, passed "July 24th, 1866, and other acts incorporated in Title "LXV, of the Revised Statutes? Can a State prohibit "such a company, from doing such a business within "its jurisdiction, unless it will pay a tax and procure a "license for the privilege? If it can, it can exclude "such companies and prohibit the transaction of such

"business altogether. We are not prepared to say "that this can be done.

"Ordinary occupations are taxed in various ways, "and, in most cases, legitimately taxed; but we fail "to see how a State can tax a business corporation "*when it cannot tax the business itself.* Of course, the "exaction of a license tax, as a condition of doing any "particular business, is a tax on the occupation, and a "tax on occupation of doing a business is surely a tax "on the business.

"Now we have decided that communication by tel- "egraph is commerce, as well as in the nature of postal "service, and if carried on between different States, it "is commerce among the several States, and directly "within the power of regulation conferred upon Con- "gress, and free from the *control of State regulations*, "*except such as are strictly of a police character.* * *

"In our opinion, such a construction of the consti- "tution leads to the conclusion that *no State has the* "*right to lay a tax on interstate commerce in any form*, "whether by way of duties laid on the transportation "of the subjects of that commerce, or on the receipts "derived from that transportation, or on the occupation "or business of carrying it on, and the reason is that "such taxation is a *burden on that commerce*, and "amounts to a regulation of it, which belongs solely to "Congress. This is the result of so many recent cases, "that citation is hardly necessary. * * * * *

"We may here repeat, what we have so often said "before, that the exemption of interstate and foreign "commerce from State regulation does not prevent the "State from taxing the property of those engaged in "such commerce located within the State, *as the prop-* "*erty of other citizens is taxed*, nor from regulating "matters of local concern which may incidentally affect "commerce, such as wharfage, pilotage, and the like."

Perhaps none of the many decisions of this court upon the great questions arising out of the interstate commerce clause of the constitution more clearly define to what extent the power of regulating such commerce is vested in Congress, and the manner in and extent to which such commerce may be affected by the States, or more clearly show the necessity of preventing the imposition of burdens thereon by States, excepting within the strictest and plainest limits, than those of Robbins v. Taxing Dist., 120 U. S. 493, and Steamship Co. v. Pa., 122 U. S. 346.

In the former case the court say:

"It is also an established principle, as already indi-
"cated, that the only way in which commerce between
"the States can be legitimately affected by State laws
"is, when, by virtue of its police power, and its juris-
"diction over persons and property within its limits, a
"State provides for the security of the lives, limbs,
"health and comfort of persons, and the protection of
"property, or when it does those things, which may
"otherwise incidentally affect commerce, such as the
"establishment and regulation of highways, canals,
"railroads, wharves, ferries and other commercial fa-
"cilities; the passage of inspection laws to secure the
"due quality and measure of products and commodi-
"ties; the passage of laws to regulate or restrict the
"sale of articles deemed injurious to the health or
"morals of the community; the imposition of taxes
"upon persons residing within the State or belonging
"to its population, and upon avocations and employ-
"ments pursued therein, not directly connected with
"foreign or interstate commerce, or with some other
"employment or busines exercised under authority of
"the constitution and laws of the United States, and

"the imposition of taxes upon all property within the "State, mingling with and forming part of the great "mass of property therein. But in making such in- "ternal regulations, a State cannot impose taxes upon "persons passing through the State or coming into it, "merely for a temporary purpose, especially if con- "nected with interstate or foreign commerce, nor can "it impose such taxes upon property imported into the "State from abroad or from another State, and not yet "become part of the common mass of property therein, "and no discrimination can be made by any such reg- "ulations adversely to the persons or property of other "States; and no regulations can be made directly af- "fecting interstate commerce. *Any taxation or regu- "lation of the latter* character would be an unauthor- "ized interference with the power given to Congress "over the subject."

Robbins v. Taxing Dist., 120 U. S. 493.

And in Steamship Co. v. Pa., 122 U. S. 346: "It "is hardly within the scope of the present discussion to "refer to the disastrous effects to which the power to "tax interstate or foreign commerce may lead. If the "power exists in the State at all, it has no limit but the "discretion of the State, and might be exercised in such "a manner as to drive away that commerce, or to load "it with an intolerable burden seriously affecting the "business and prosperity of other States interested in "it; and if those States, by way of retaliation, or other- "wise, should impose like restrictions, the utmost con- "fusion would prevail in our commercial affairs. In "view of such a state of things, which actually existed "under the confederation, Chief Justice Marshall, in "the case before referred to, said: "Those who felt "the injury arising from this state of things, and those "who are capable of estimating the influence of com-

"merce on the prosperity of nations, perceive the ne-
"cessity of giving control over this important subject
"to a single government. It may be doubted, whether
"any of the evils proceeding from the feebleness of the
"Federal Government contributed more to that great
"revolution which introduced the present system, than
"the deep and general conviction that commerce ought
"to be regulated by Congress. It is not, therefore,
"matter of surprise, that the grant should be as exten-
"sive as the mischief, and should comprehend all for-
"eign commerce among the States. To construe the
"power so as to impair its efficacy, would tend to de-
"feat an object in the attainment of which the Ameri-
"can public took, and justly took, that strong interest
"which arose from a full conviction of its necessity.
12 Wheat. 446."

In Moran v. New Orleans, 112 U. S. 69, an attempt was made to impose a license tax upon owners of vessels engaged in interstate trade. The court held that a municipality had no right to exact a tax for the use and enjoyment of a license granted by the United States. The language used is fully applicable to the present case, as the ordinance in terms imposes the charge "for the privilege of using the streets," etc., and thereby, as has been shown, for a privilege or license granted by the Government.

The court say:

"But here is not a tax on the profits and income
"after they have been realized from the business. It
"is a charge explicitly made as the price of the *privi-*
"*lege* of navigating the Mississippi river between New
"Orleans and the Gulf, in the coastwise trade, as
"the condition on which the State of Louisiana
"consents that the boats of the plaintiff in error may

"be employed by him, according to the terms of the li-
"cense granted under the authority of Congress. The
"sole occupation sought to be subjected to the tax is
"that of using and enjoying the license of the United
"States, to employ these particular vessels in the coast-
"ing trade; and the State thus seeks to burden with
"an exaction, fixed at its own pleasure, the very right
"to which the plaintiff in error is entitled under, and
"which he derives from, the Constitution and laws of
"the United States. The Louisiana statute declares
"expressly, that if he refuses or neglects to pay the
"license tax imposed upon him, for using his boats in
"this way, he shall not be permitted to act under and
"avail himself of the license granted by the United
"States, but may be enjoined from so doing by ju-
"dicial process. The conflict between the two author-
"ities is direct and express. What the one declares
"may be done without the tax, the other declares
"shall not be done except upon payment of the tax.
"In such an opposition, the only question is which is
"the superior authority; and reduced to that, it fur-
"nishes its own answer."

And equally emphatic is the language of the court in:

California v. Pacific R. R., 127 U. S. 40.
And Phila. S. S. Co. v. Pa., 122 U. S. 344.

As to telegraph companies, such as defendant, that have accepted the provisions of the act of Congress, there can be no question respecting their right to use city streets (post roads) for their wires, irrespective of State or municipal consent.

The language of the late Mr. Justice Bradley, in Stockton v. B. & N. Y. R. Co., 32 Fed. Rep. 9, is most significant:

"Still, it is contended that, although Congress may "have power to construct roads and other means of "communication between the States, yet this can only "be done with the concurrence and consent of the "States in which the structures are made. If this is so, "then the power of regulation in Congress is not "supreme; it depends on the will of the States. We "do not concur in this view. We think that the power "of Congress is supreme over the whole subject, un- "impeded and unembarrassed by State lines or State "laws; that, in this matter, the country is one, and "the work to be accomplished is national; and that "State interests, State jealousies, and State prejudices "do not require to be consulted. In matters of foreign "and interstate commerce there are no States."

It will suffice, without further quotation, to refer the court to the following cases, which define the limitations upon the power of a State or municipality to interfere with, tax or burden the operations of an instrument of interstate commerce. And, we submit, those cases clearly decide that the only taxes or pecuniary burdens which can be imposed *are the property taxes borne equally by the body of the citizens.*

West. U. T. Co. v. Mass., 125 U. S. 548.
Gloucester Ferry Co. v. Pa., 114 U. S. 211.
Moran v. New Orleans, 112 U. S. 69.
Pickard v. Pullman Co., 117 U. S. 47.
Lyng v. Michigan, 135 U. S. 161.
McCall v. California, 136 U. S. 104.
Krutcher v. Ky., 141 U. S. 62.

West. U. Tel. Co. v. Ala., 132 U. S. 472.
Norfolk R. R. v. Pa., 136 U. S. 114.
Railroad Co. v. Peniston, 18 Wall. 5.
McCullough v. Md., 4 Wheat. 400.
Brown v. Md., 12 Wheat. 444–448.
R. R. Co. v. Md., 21 Wallace, 472.
Welston v. Mo., 91 U. S. 275.
Hall v. De Cuir, 95 U. S., p. 488.

VI.

Ordinance No. 12,733 (as originally enacted, and as embodied in the revised ordinances), is unreasonable, unjust and oppressive, as it imposes a burden without a benefit, and is illegal and void.

What benefit does defendant receive in return for the payment of the enormous tax of $7,545 per annum, additional to all other taxes generally assessed?

The total valuation of all of defendant's property in the City of St. Louis, in 1884, as fixed by the State Board of Equalization, was $17,064.53. The $5 charge for that year, therefore, amounted to more than 44 per cent. of defendant's entire property in the City of St. Louis. The petition seeks to recover for but three years' defaulted payments, and yet the amount is, as shown by the assessments made by the Board of Equalization, more than $4,000 in excess of the assessed value of defendant's entire property in St. Louis.

We have already shown that the privileges upon which the charge is laid have not been bestowed by the city, and that their enjoyment is in nowise depend-

ent upon its consent. We have also shown, by evidence, that all taxes of every nature assessed under the general revenue laws against defendant have been paid. We have also shown that the cost to the city of supervising and "regulating" defendant's entire business and operations in St. Louis is comparatively a trifling sum.

We have also shown that the city, by ordinance, requires defendant to permit it to use the top *cross-arm of every pole free of charge;* and it is admitted that defendant has complied with the terms of this ordinance, and the evidence establishes the fact that the city has actually enjoyed this privilege ever since the passage of the ordinance.

It is admitted that defendant has fully complied with all the requirements of the city ordinances as to refilling excavations and replacing sidewalks. More than two-thirds of the poles are in the sidewalks and a portion of the remaining third in the alleys. All repairs to these sidewalks and alleys are required to be made by the owners of abutting property, and if not made by such owners, are made by the city and the cost thereof assessed upon the property.

Sec. 551 Ch. 15, Art. 1, Rev. Ord. 1887, City St. Louis, and Sec. 3, Ch. 15, Art. 1, Rev. Ord. St. L., 1881.

Sec. 4, Ch. 15, Art. 1, Rev. Ord. 1881, and Sec. 557, Ch. 15, Art. 1, Rev. Ord. 1887.

In Corrigan v. Gage, 68 Mo. 544, the Supreme Court held, in a suit upon a special tax bill for the

building of a sidewalk, that evidence was admissible to show that the ordinance authorizing its construction was unnecessary and oppressive. The court say: "Speaking in general terms, the authorities of a city "may be said to have a large discretion as to the ne- "cessity or expediency of the ordinances which they "adopt. But their powers in this regard are by no "means omnipotent, otherwise the citizens would be "without remedy or redress. Those powers must be "exercised within the bounds of reason and apparent "necessity; *they must not impose a burden without a "benefit*, and the reasonableness of their exercise is a fit "subject for inquiry."

City v. Weber, 44 Mo. 550.
Halpin v. Campbell, 71 Mo. 493.
Cape Girardeau v. Riley, 72 Mo. 220.

The Circuit Court for the Eastern District of Pennsylvania has held an ordinance, identical with that in the present case, unreasonable and void.

City of Philadelphia v. W. U. T. Co., 40 F. R. 615.

(For terms of ordinance involved, see W. U. T. Co. v. Philadelphia, 11 Cent. Rep. 192.)

"Municipal by-laws must be reasonable; whenever they appear not to be so, the court must, as a matter of law, declare them void."

Cooley on Const. Lim. (5th Ed.) *200, pp. 240, 243.
Dillon on Mun. Corp. (2d Ed.), Sec. 253.
Field on Corporations, Sec. 296.

Kip v. City of Paterson, 26 N. J. Law, 298.
Memphis v. Winfield, 8 Humph. 707.
Hayden v. Noyes, 5 Conn. 391.
Com. v Patch, 97 Mass. 221.
Mayor of Hudson v. Thorne, 7 Paige, 261.
Dunham v. Trustees of Rochester, 5 Cowen, 462.
Commrs. v. Gas Co., 12 Pa. St. 318.
Com. v. Robertson, 5 Cush. 438.
Com. v. Worcester, 3 Pick. 462.

In conclusion, we desire to say that if the ordinance in question be sustained, the defendant company, an admitted Government agent and instrument of interstate commerce, will, in addition to all taxes assessed for State and city purposes, and the expenditure of all sums necessary to refill excavations and restore all streets in which its poles are placed, be compelled to pay the city yearly a sum almost equal to one-half the value of its entire property, real and personal (including franchises), in the City of St. Louis. And this payment will be made as consideration for a "privilege," in fact, enjoyed solely through direct Federal and State grants. The bare suggestion of such a result shows the wisdom of the constant and unvarying rulings of this court, under which, while governmental agents and instruments of interstate commerce are made to bear their share of all general taxes in common with

others, the imposition of burdens, such as the charge in question, has been forbidden and restrained.

Respectfully submitted.

Clemens Smith

DICKSON & SMITH,

Attorneys for Defendant in Error.

CHARLES W. WELLS,
WILLARD BROWN,
GEORGE H. FEARONS,

Of Counsel.

149-463
179-495

Office Supreme Court U. S.
FILED.
DEC 15 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 94.

THE CITY OF ST. LOUIS, PLAINTIFF IN ERROR,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error on the Proposition that there is no Question in the Record which the Supreme Court can Review.

I.

There is no merit in the point made by defendant in error that this honorable Court cannot review this case because the circuit court made no *special finding of fact*, but simply a general finding for defendant.

Counsel for defendant in error refer the Court to the judgment (R., p. 17) as conclusive of this proposition. This is not *all* the record shows. The answer (R., p. 11) pleads five specific defenses. The agreed statement of facts (R., p. 19) upon which the case was submitted to the circuit court

shows that each of the *facts* constituting each specific defense was agreed upon, with the exception of whether the streets of St. Louis were post roads, and as to this there was no conflict nor, in fact, any denial. Thus there was no question of fact to be found by the circuit court. The only question for that court to decide was what was the law upon the facts thus agreed to. The plaintiff in error asked the court to declare the law upon the agreed facts to be that it was entitled to recover, which the court refused to do, and plaintiff duly saved its exception. (R., p. 52.)

But this was not all. In addition to the fact that the facts in this case were agreed to and that in the circuit court there was no difference between the parties as to the facts, and hence there was no disputed fact to be settled by the court, *the circuit court did make a special finding of fact*, upon which it hinged its determination of the law applicable thereto.

The finding and decision of the court (R., pp. 53, 54, and 55) finds the fact to be that "on March 23, 1884, the municipal assembly of the city of St. Louis amended ordinance No. 11604, entitled 'An ordinance to regulate the erection of telegraph and telephone poles,' by adding thereto four new sections, numbered 11, 12, 13, and 14. Section No. 11 is as follows:

"'From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, shall pay to the city of St. Louis, for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city.'

"Suit in the nature of an action of debt is brought under this section to recover the sum of $22,635, which is alleged to have become due in consequence of the use by defendant of 1,509 telegraph poles since July 1, 1884, said poles having been erected prior to that date."

Upon this finding of the facts the court declared the law to be that the ordinance provision so found to have been passed by the city of St. Louis is void under the Constitution of the United States.

Thus there is a special finding of fact, with a conclusion of law applicable thereto, and this conclusion of law is what plaintiff asks this honorable Court to review and reverse.

We raise no question of fact. The facts are conceded on both sides. The difference between us is only one of law.

We saved an exception to the ruling of the court on the question of law (R., p. 52) "as to the legal sufficiency or effect of the whole evidence," which brings us within the rule laid down in Martinton *vs.* Fairbanks, 112 U. S., p. 671. We have preserved the point "whether all the evidence was sufficient in law to warrant a finding for the plaintiff (here the defendant) * * * by a request for a definite ruling upon that point," as the case last cited holds is sufficient.

We have complied with the requirements laid down by Mr. Justice Miller in Norris *vs.* Jackson, 9 Wallace, 125, by saving by a bill of exceptions "the rulings of the court in the progress of the trial" and by following his third specification of requirements, "that if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict which raises all the legal

propositions, or they must present to the court their propositions of law and require the court to rule on them."

All the cases cited by counsel for defendant in error are referred to and discussed in Martinton *vs.* Fairbanks, 112 U. S., 670, and we confidently assert that the case at bar is reviewable by this honorable Court under the rules laid down in all these cases. None of the cases cited arose upon the pleadings or upon an agreed statement of facts or upon a request for a declaration of the law applicable to the whole case or upon a special finding of facts such as is presented in this case. They were all attempts to have this honorable Court review the *evidence*, discover the facts under a general finding, and then declare the law, when no exceptions to the rulings during the progress of the trial, no requests for declarations of the law, no agreed statement of facts, and no special finding was to be found in the record, as is the case here. In short, the cases cited by defendant and the rules of practice they announce are axiomatic in all appellate practice.

Appellate courts decide only law questions. The law of a case may be raised by a special finding of facts, upon which the appellate court will make the application of the law, or it may be raised by having the trial court pass upon instructions or declarations of law, and the appellate court will then review the correctness of the legal propositions upon which the trial court decided the case.

In this case we have done *both* and more, too. We have filed a written agreement of all the facts necessary to the determination of the case.

We ask no review of any question of fact. We ask the superior judgment of this honorable Court upon the questions of law, and we have properly saved our rights to have the law so declared by this Court.

Respectfully submitted,

W. C. MARSHALL,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
APR 27 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH CO.,
Defendant in Error.

No. 94.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR FOR A REHEARING HEREIN.

W. C. MARSHALL,
Attorney for Plaintiff in Error.

PRINTED BY CENTRAL LAW JOURNAL COMPANY: ST. LOUIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH CO.,
Defendant in Error.

No. 94.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR FOR A REHEARING HEREIN.

I.

Pursuant to the order made herein by this Honorable Court on the 17th of April, 1893, giving counsel on both sides of this cause leave to file a brief, "upon the question whether the City of St. Louis has such interest in and control over the streets, alleys, and public places within its limits as authorized it to impose upon a telegraph company a charge in the nature of a rental for the exclusive use of portions thereof in the manner stated," I beg leave respectfully to submit to this Honorable

Court the following considerations and authorities, which, in my judgment, fully sustain the right of the City of St. Louis in this respect.

II.

I have carefully read the petition for rehearing, and find that the points, statutes and authorities therein contained, together with the whole reasoning back thereof, are precisely the same that were used and employed by counsel for defendant in error upon the hearing of this cause in this court.

Nothing new, nothing that was not then fully suggested and urged, is now submitted. It is simply an appeal to this court to retract the conclusions reached by the court after the case had been fully briefed and carefully argued on both sides, and the only attempt, I have been able to discover, now made, to change the decision of this court is in the following language found on page 3 of the petition for rehearing, to-wit:

"The opinion of the court treated the streets and alleys as a part of the property of the city, and sustained the right of the city to charge the defendant, the Western Union Telegraph Company, a reasonable sum for the use of this property occupied by the poles of that company. The doctrine thus announced by the court is of extreme moment to this defendant, because it maintains in every city, large and small, within the limits of the United States, poles and wires, and already, in the State of Missouri, and in other States, municipalities moving thereto by the decision of this court in this case

are taking steps to impose upon this defendant large obligations under the guise of a rental, claiming to be acting within the principles of the opinion in this case."

I respectfully submit that such an argument ought not to be considered by this court. If the right belongs to the city, the fact that the defendant has been enjoying such privileges in St. Louis and in other cities, large and small, without having paid anything therefor in the beginning, and without having paid any rental or other consideration for the use of that which belongs to such cities, for so many years, creates no legal right to a continuance of such enjoyment free of charge.

Legal questions must be determined upon legal considerations, and ought not, and will not be influenced by arguments of this character.

I pass, therefore, immediately to the consideration of the propositions so tersely and aptly stated in the order of this Honorable Court.

III.

Has the City of St. Louis such interest and control over its streets as authorizes it to impose upon a telegraph company a charge in the nature of a rental for the exclusive use of portions thereof?

By the Act of November 17th, 1885 (Rev. Stats. 1855, p. 1520), telegraph companies were by the Legislature authorized to construct their lines upon and along any of the highways and public roads, and across any of the waters within the limits of this State, by the erection of the necessary fixtures,

including posts, piers, or abutments, for sustaining such wires, and were required so to construct them as not to incommode the public use of such highways, or roads, or the navigation of such waters, and the city authorities, through which such lines passed, were authorized to control the places where such poles were located, the kind of posts to be used, the height at which and the places where the wires were to be run.

The revision of the laws of Missouri of 1865 (Rev. Stats. of Missouri, 1865. p. 349, § 5), provided: "Companies organized under the provisions of this chapter, for the purpose of constructing and maintaining telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures, along, upon, and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters."

Sec. 14 of the same chapter in the Revision of 1865, preserved the provision with reference to the power of cities, that I have quoted, from the Act of 1855.

The revision of 1879 (Rev. Stats. 1879, pp. 158 and 159, §§ 879 and 888), followed, verbatim, the revision of 1865.

The revision of 1889 (Rev. Stats. 1889, p. 693, § 2721), changed the law in the following particulars: It followed § 879 of the revision of 1879, except instead of saying along and across any of the public roads, etc., it provided for the construction of telegraph lines along, across or *under* any of the public roads, etc., and then added the following

words to the section: "Provided, any of the telegraph or telephone companies desiring to place their wires and other fixtures underground in any city, they shall first obtain consent from said city through the municipal authorities."

By § 2730 of the Revised Statutes of 1889, the provisions of § 888 of the revision of 1879, and of section 14, chapter 65, of the revision of 1865, and of section 3 of the Act of 1855 were preserved.

The Constitution of Missouri, now in force, was adopted on the 2d of August, 1875. By § 20 of Art. 9 of that constitution, the City and County of St. Louis were authorized to select a board of thirteen freeholders to propose a scheme for the enlargement of the city, the reorganization of the government of the county, and a charter for the City of St. Louis, which scheme was required to be submitted to the qualified voters of the whole county, and which charter was required to be submitted to the voters of such city, and it was provided as follows: "And if a majority of such qualified voters, voting at such election, shall ratify such scheme and charter, then such scheme shall become the organic law of the county and city, and such charter the organic law of the city, and at the end of sixty days thereafter shall take the place of and supersede the Charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme."

Pursuant to the power thus granted a board of freeholders was appointed which did the work contemplated by the quoted sections of the Constitu-

tion; their scheme and charter was submitted, and was adopted by the people, and is now the organic law of St. Louis.

Among the powers contained in that charter it was provided by par. 2 of § 26 of Art. 3 as follows: "The Mayor and Assembly shall have power within the city by ordinance to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning and repairing the same, and to condemn private property for public use, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers and drains, and TO REGULATE THE USE THEREOF, etc."

The 5th paragraph of the same section gave the city the power: "to license, tax and regulate * * * telegraph companies or corporations, street cars, etc."

Article 6 of the Charter, §§ 2 to 11, provided that, whenever the assembly should provide by ordinance, for establishing, opening, widening or altering any street, avenue, alley, wharf, market place or public square, etc., and it became necessary for that purpose to appropriate private property, the city counselor, in the name of the city, should apply to the Circuit Court, for the appointment of commissioners to assess the damages occasioned by the condemnation of private property for such purposes.

It further provided for the filing of a petition, the issuance of a summons, the appointment of commissioners, and required the commissioners to ascertain the actual value of the land and premises proposed to be taken, without reference to the proposed improvements, and the actual damage done to property thereby, "and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement."

It further provided for a review of the report of the commissioners by the Circuit Court, and gave the Circuit Court full power over the whole proceeding, and provided that after final judgment, the city should pay the total amount of damages to the owner or owners of property taken, or into court for their benefit, and should reimburse itself to the extent of the special benefits assessed against such abutting owners.

Long prior to the adoption of this charter and ever since St. Louis has been a city she has been compelled thus to condemn, buy and pay for such streets as she desired, and now owns, and over which defendant's lines extend.

The power thus to open and establish streets will be found in the 8th paragraph of section 1 of article 3 of the act amending the charter of the City of St. Louis, approved February 8th, 1839, and the provisions with reference to the condemnation of

property for street purposes will be found in article 6 of the same act.

The power to open and establish streets, aforesaid, will be found in the 8th paragraph of § 2. art. 3 of an act entitled, "An act to reduce the law incorporating the City of St. Louis and the several acts amendatory thereof, into one act, and to amend the same," approved February 8th, 1853, and the power and proceeding to condemn property for streets will be found in article 6, of that act.

The same provisions have remained in the Charter of St. Louis ever since 1831, with the exception of the form of the proceedings in court in such cases. The City of St. Louis has no street, alley or public place that it did not buy, and pay for, or that was not dedicated to it by the owner thereof.

Neither the State of Missouri, nor any person outside of the corporate limits of St. Louis, has ever paid one cent toward acquiring, maintaining or keeping in order any of our streets. Not one dime of the revenues collected from the people of the State has ever been spent on our streets. They were bought and paid for out of money raised by taxation from our own people. They belong to us as completely and effectually as any property belongs to any individual. It is true the State created the municipality of St. Louis and authorized it to buy streets, but it required it to pay for such streets just as completely as it required the city to pay for its public buildings. The State has no more legal or equitable title to the street than it has

to the buildings or fire apparatus or the water-works or any of the personal property belonging to the city.

Recognizing this doctrine, the framers of the Constitution of 1875 saw the injustice to the city of permitting street car lines to be authorized on the streets by the Legislature, and so adopted § 20 of article 12 of that constitution, which prescribed that: "No law shall be passed by the General Assembly, granting the right to construct and operate a street railroad within any city, town or village, or any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchise so granted shall not be transferred without similar assent first obtained."

So the Legislature, recognizing that the State never had any such control over the streets so acquired by the City of St. Louis since 1831, and to prevent telegraph and telephone companies from assuming any such position or arrogating to themselves any such right as is here contended for by § 2721 of article 5 of chapter 42, page 693, Rev. Stats., 1889, announced what had always been the fact and the law, that no telegraph or telephone company could place its wires underground in any city without first obtaining the consent of such city.

Streets and alleys are local improvements, and § 10, of article 10, of the Constitution of 1875, prohibits the General Assembly from imposing taxes on cities for municipal or local purposes, and

requires the General Assembly, by general laws to "vest in the corporate authorities thereof the power to assess and collect taxes, for such purposes."

Thus we see, that ever since 1831, the City of St. Louis has owned its own streets; that the Acts of '58, '65, '79 and '89, authorizing the formation of telegraph and telephone companies, did not take away any of the rights of proprietorship which the City of St. Louis had in and to its streets, and we confidently assert that the law-makers never intended so to do.

We further specially call the attention of this Honorable Court to the fact that since the adoption of the Constitution of 1875, no Act of the Legislature of Missouri can be found giving to any person, or corporation, any right to use or occupy in any manner whatever, any portion of the streets of St. Louis. Prior to that time the Session Acts are full of such grants and privileges by the Legislature. This is a legislative construction of the effect and purpose of the Constitution of 1875 to vest in St. Louis full control over its streets. The bar of this State have likewise acted upon the same principle, and have sought for their clients privileges of this character from the municipal authorities.

IV.

Telegraph companies acquired no rights under the laws of Missouri to permanently occupy streets or highways.

None of the Acts of the Legislature referred to herein, or by counsel for defendant, undertake to

enter into a contract with defendant or any other company. Those acts were simply regulations adopted by the State for the use of highways, and permitted corporations, without money and without price, to use the highways of the State subject to such regulations. It was in no sense a vested right which could not be altered or changed. It was not a contract. It lacked the essential element of a consideration to make it a contract. It was purely *nudum pactum*. It was simply a regulation, which the State might withdraw, repeal or alter at any time. When the State gave the absolute control of such matters to the city, as it did by the Charter of 1831, and as it has ever since done by the successive charters granted by the State, it gave to the city the power over the streets of St. Louis with the express privilege of regulating the use thereof. The subsequent enactment of 1855 did not undertake to take away from the city the power conferred upon it in 1831. The Act of 1855, carried into the revision of our laws since then, was a general act, applicable to the highways of the State, and could not have the effect of repealing the special act granting the power to the City of St. Louis over its streets in 1831.

Certainly since 1875 when the Constitution of Missouri authorized the City of St. Louis to adopt a charter which should supersede all laws passed prior thereto, which were inconsistent with such charter, it cannot be plausibly claimed that the State has had any control over the streets of the City of St. Louis.

V.

Whatever rights defendant acquired from the State of Missouri by virtue of the laws passed regulating telegraph companies, and authorizing the construction of lines on public highways, were not vested rights, but were subject to alterations, suspension and repeal in the discretion of the Legislature.

The revision of 1855, in force at the time the Act of 1855 with reference to telegraph companies was enacted, provided in § 7 of Chap. 34, Rev. Stats. 1855, p. 371, as follows: "The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

The Supreme Court of Missouri in the case of Pacific Railroad Co. v. Renshaw, 18 Mo. 210, decided that under this provision a charter granted to the Pacific Railroad Co. in 1849 was subject to the power of the Legislature to alter, suspend or repeal.

The Constitution of 1865, par. 4, § 1, Art. 6, prescribed as follows: "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

Since 1865 the Legislature has granted no special charters. Never at any time in this State has any corporation received a charter from the State which was not subject to alteration, amend-

ment or repeal, according to the laws of this State, and none such could be granted or acquired since 1865. Whatever rights, therefore, any telegraph company may have acquired from the State of Missouri, or whatever privileges such company may have exercised under the laws of this State regulating the use of highways were not vested rights, but were taken or acquired by such companies in the face of and subject to these statutory and this constitutional provision, that they could be altered, suspended or repealed, at any time by the Legislature, and I take it, by the power to whom the Legislature has delegated the right so to do.

VI.

But if it be said that this defendant is not a Missouri corporation, and therefore its rights are not affected by these provisions of the statutes and Constitution of Missouri, it is a sufficient answer to say, that the Act of 1855, under which this defendant claims the right to permanently occupy the streets of St. Louis, expressly provides that every corporation, without regard to the State creating it, engaged in telegraphing for the public, by electricity, in this State, shall be subject to the liabilities and be governed by the provisions contained in that act. (Sec. 1, Chap. 156, Rev. Stats. 1855, p. 1520; being § 1 of the Act of 1855.)

VII.

I respectfully submit that there is no merit in the application for a rehearing in this case. For my own part, I desire to express to this Honorable

Court, my thanks for the patience and attention given by it to this case upon its argument last December. The case had long been pending. Its issues were well understood. Its importance was urged upon the court at that hearing as earnestly as it is now urged. The effects and consequences of an adverse decision were then fully commented upon and explained, by the able counsel for defendant. The effects and consequences of an adverse decision to the plaintiff and to other cities of the United States, which are similarly situated, and which possess the same powers that the City of St. Louis possesses, was not prominently brought out by counsel for defendant. The benefits this defendant has received for all these years without a cent of cost to itself, either of acquiring a right of way for itself or of interest on the capital necessary to acquire such a right of way, absorbed the attention and interest of the defendant. It was no concern of defendant's that it was occupying, permanently, a portion of the property which the city had bought and paid for, and this company now seems greatly aggrieved that it will no longer be permitted thus to occupy other people's premises without paying rent therefor.

If the contention be true that the City of St. Louis does not own its streets, then I beg to inquire upon what principle she is continually being held liable in damages, to be satisfied out of revenue raised by taxation of her own people, received by persons traveling on such streets from her negligence in permitting them to be in a dangerous condition or out of repair? Aye, why is it that St.

Louis is held liable in damages to persons who are injured by coming in contact with telegraph and telephone wires charged with electricity that have fallen upon such streets? Such recoveries certainly could not be maintained unless the city was the proprietor of its streets. If the State owns the highways the State should bear these burdens, and not only such burdens, but the burden of paying for them in the first instance.

Our city holds its Charter by a constitutional grant, and the Legislature of the State cannot take it away from us. In this respect it is perhaps different from any other city in the United States.

This Honorable Court has sustained the right of our city to demand wharfage dues from vessels landing at its improved wharf.

Union Packet Co. v. St. Louis, 100 U. S. 423.

We have the same title to our streets that we have to our wharf. We bought and paid for and improved both. If we own the wharf so as to entitle us to charge wharfage dues, it must logically follow as surely as the shadow follows the substance, that we also own our streets and can charge a rental for their use.

We have a right to ask this court to ignore this whole contention of the defendant, for the reason that no such defense has been pleaded in this case. No such issue is raised by the pleadings. No such point was made in the briefs. It was the burden of Mr. Dillon's oral argument, however, and we are therefore anxious to have it decided here now,

irrespective of the irregular matter of its late presentation as a point in the case, for we do not want it to remain an open question in this litigation.

I respectfully submit that the decision in this case is right and should be allowed to stand and that the petition for a rehearing herein should be denied.

Respectfully submitted,

W. C. MARSHALL,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 12 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT ON PROPOSITION THAT THERE IS NO QUESTION IN THE RECORD WHICH THE SUPREME COURT CAN REVIEW.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel for Defendant.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of the United States.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

STATEMENT.

This action was brought in the Circuit Court of the City of St. Louis, by the filing of a petition on the 7th day of April, 1888. In its petition the City of St. Louis set out as the basis of its cause of action the terms of Ordinance No. 11,604, entitled "An Ordinance to regu- "late the erection of telegraph and telephone poles," together with the provisions of an ordinance to amend Ordinance No. 11,604, viz., Ordinance No. 12,733. These ordinances are to be found in the petition fully set forth in the record (pp. 3 to 6). The petition further averred that, under the provisions of the foregoing ordinances, the defendant The Western Union Telegraph Company became bound to pay to the City of St. Louis annually for the privilege of maintaining each and every telegraph pole erected, maintained or used by it in the streets, alleys and public places of said city, the sum of five dollars; and that the defendant had erected, maintained and used in the streets, alleys and public places of the City of St. Louis, from the first day of July, 1884, until the first day of July, 1887,

fifteen hundred and nine poles, and that for each year it was entitled to collect five dollars for each pole; and that on the first day of July, 1887, in consequence of the foregoing matters, there was due and owing from the Telegraph Company to the City of St. Louis the sum of $22,635, for which judgment was asked (Record, p. 7). At the same term at which this petition was filed the defendant appeared and caused the removal of this cause to the Circuit Court of the United States for the District of Missouri, by filing a petition and bond therefor (Record, pp. 8, 9 and 10). In the Circuit Court answer was made by The Western Union Telegraph Company and amended answer subsequently filed on the 16th day of February, 1889 (Record, p. 11). In this answer issue was made with some of the averments of the petition and various defenses stated, the first being an allegation that the ordinances set forth were illegal, coupled with a denial of indebtedness to plaintiff in the amount stated in the petition or in any other amount. In the second defense the defendant sets forth the Act of Congress of July 24, 1866, and the acceptance by the defendant of the provisions of the same, wherein and whereby it became entitled to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, etc. It further averred that all the lines of telegraph referred to by the plaintiff in its petition and upon which the said ordinances operated, were lines of telegraph used as instrumentalities of the United States Government under the said act, and also that the

same were constantly used as instrumentalities of interstate commerce. In further defense it alleged that all its property within the State of Missouri was regularly assessed for taxation, as provided by the statutes of said State, and that all taxes assessed and levied upon its property had been duly paid by it (Record, pp. 12-15). To this answer a reply was filed (Record, p. 18), which consisted of a general denial of all the allegations of the answer.

In October, 1888, trial by jury was waived in writing (Record, p. 11). On the 6th day of May, 1889, the cause was tried to the court upon a stipulation as to some of the facts and upon oral testimony produced at the trial on behalf of both plaintiff and defendant (Record, pp. 16, 17-19).

After the testimony was all in the plaintiff moved the Court as follows, to give the following instruction: The Court declares the law to be that, under the pleadings and evidence, plaintiff is entitled to judgment for 22.63, with interest, etc.," (Record, p. 52). After consideration by the Court for several weeks and an examination of briefs, judgment was entered for the defendant (Record, p. 17). Within three days thereafter the plaintiff filed a motion for a new trial upon the following grounds: (1) Because the judgment should have been for the plaintiff and not for the defendant; (2) because the Court erred in refusing to give instructions asked for by the plaintiff; (3) because the Court erred in giving instructions. Upon the overruling of this motion for a new trial, a bill of exceptions was duly presented, allowed, signed and ordered to be filed and made a part of the record herein; also writ of error and citation (Record, p. 18).

POINTS.

The record discloses the fact that only a general finding was made in behalf of the plaintiff in error, and, there being no exception raising any question of law, such finding is conclusive and is not subject to revision by this Court (see Judgment, Record, p. 17, and Order for Judgment, p. 52).

In this action at law, and by means of this writ of error, the plaintiff in error seeks to bring before this Court for review the mixed questions of law and fact which were decided by the Circuit Court, thus attempting to reverse a general finding involving mixed questions of law and fact made by that Court. No argument should be necessary to convince this Court that such review cannot be had on a writ of error. Section 1011 of the Revised Statutes provides:

"That there shall be no reversal in the Supreme Court * * * upon a writ of error * * * for any error of fact."

Section 649 of the Revised Statutes provides that:

"The finding of the Court upon facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 of the Revised Statutes, provides that,

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to Section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme

Court upon a writ of error or upon appeal; *and when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment.*"

There is, therefore, no method of bringing questions of fact, in cases tried as this case was tried, before this Court by writ of error for review, except in the manner specified in the foregoing section, viz., "where the findings are special," and present all the ultimate facts upon which the judgment is founded.

Only, first, questions of law which arise upon facts as found, either by the Court or by the jury by law can be brought here for review; or, second, rulings of the Court in the progress of the trial upon matters of law which are excepted to at the time, and presented in a bill of exceptions; or, third, only such questions of law as arise upon the pleadings, can be brought here for review on writ of error.

An examination of the record discloses the fact that the proceedings upon the trial consisted of the reading, first, of an agreed statement of facts on the part of the plaintiff (Record, p. 19). Then an offer on the part of the plaintiff of the ordinances set forth in the plaintiff's petition (Record, pp. 20, 21).

Then an offer of additional ordinances or sections of ordinances which were objected to by counsel for defendant as incompetent, irrelevant and immaterial, but which objections were, in each case, overruled and the testimony admitted on behalf of the plaintiff (Record, pp. 23, 24). This was followed by the calling of certain witnesses to testify as to the number of poles and the dangers arising from wires in the streets of the city. Thereupon, the plaintiff resting

its case, the defendant offered certain ordinances of the City of St. Louis (Record, p. 28), and called certain witnesses to controvert some of the testimony offered by the plaintiff, and also to show the post-roads and letter-carrier routes of the City of St. Louis. After the defendant's testimony had been introduced supporting the allegations of its amended answer, the plaintiff in rebuttal called certain witnesses (Record, p. 50). In all the testimony and proceedings upon the trial there are no exceptions entered on behalf of the defendant to any action of the Court. All the testimony objected to as it was offered was objected to by the defendant, but each objection was overruled and the testimony admitted on behalf of the plaintiff. There are, therefore, no exceptions on the proceedings at the trial available to the plaintiff in error.

At the close of the testimony the record discloses the following proceedings: "The plaintiff "moved the Court to give the following instruc- "tions: The Court declares the law to be that, "under the pleadings and evidence plaintiff is entitled "to judgment for $22,635, with interest at the rate of "six per centum per annum from the day the action "was commenced," which instruction was refused by the Court, and the plaintiff duly excepted. On the 19th of June the Court entered a judgment for the defendant (Record, p. 17), and on the 20th of June, and during the same term, the plaintiff moved for a new trial (Record, pp. 17 and 52). This motion for a new trial was overruled by the Court on the 29th of June during the same term, and bill of exceptions signed, sealed, and made part of the record (Record, p. 52).

Where, therefore, as appears conclusively by the foregoing record, the finding of the Court is general, and thus includes mixed questions of law and fact, there is no method of bringing before this Court the facts in the case. The method provided in Sec. 700 is by special findings, covering all the facts in the case, and the adoption of this method of obtaining a review of the facts, excludes the idea of the existence of any other mode. No such findings were made in this case. There is, therefore, no question open for review by this Court. The finding was general and in favor of the defendant. No exceptions were taken to the rulings of the Court in the progress of the trial, and no question of law arises upon the pleadings. The following authorities are conclusive that, upon this record, no question arises upon the order of the Circuit Court in entering judgment for the defendant, or in refusing to grant the motion for a new trial filed on behalf of the plaintiff, which is open to review by this Court:

Norris vs. Jackson, 9 Wall., 125.
Martinton vs. Fairbanks, 112 U. S., 670, and cases there cited.

It may be claimed that the request of the plaintiff for the instruction that, under the pleadings and evidence, the plaintiff is entitled to judgment for $22,635, with interest, or that, by setting out in the motion for new trial, as the first ground thereof, that the judgment should have been for the plaintiff and not for the defendant, a question of law is raised upon the record as to whether or not, taking the uncontradicted evidence, the plaintiff was entitled to a judgment; and that the Court

can review this question upon this record. This suggestion, however, is wholly met by the case of Coddington vs. Richardson, 10 Wall., 516, where precisely the same question was presented in the same manner, and in response to a suggestion of this character, Justice NELSON, in delivering the opinion of the Court, says:

> "No exceptions were taken to the admission or rejection of evidence on the trial, nor any special statement of facts found by the Court. The only statement, after closing the evidence, is, 'And the Court thereupon found the issues for the plaintiff and assessed his damages at the sum of $5,000.' There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence as embodied in the record, but which, in a trial of the facts before the Court, a jury being waived, we do not look into, and we look into them only when found by the Court."

See also the following authorities to the same general effect:

Miller vs. Life Ins. Co., 12 Wall., 285.
Ins. Co. vs. Folsom, 18 Wall., 237.
Cooper vs. Omohundro, 19 Wall., 65.
Town of Ohio vs. Marcy, 18 Wall., 552.
Ins. Co. vs. Sea, 21 Wall., 158.
Jennisons vs. Leonard, 21 Wall., 302.
Tyng vs. Grinnell, 92 U. S., 417.
The Abbottsford, 98 U. S., 440.
Otoe County vs. Baldwin, 111 U. S., 1.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel for Defendant.

149-462
149-465

SUPREME COURT OF THE UNITED STATES.

THE CITY OF ST. LOUIS,

Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,

Defendant in Error.

PETITION OF THE WESTERN UNION TELEGRAPH COMPANY FOR REHEARING.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel for Western Union Telegraph Company.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of the United States,

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

Petition for Rehearing.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Western Union Telegraph Company, the defendant in error in the above-entitled cause, respectfully asks for a rehearing of the same, and for reason and cause therefor states the following:

The said action was instituted by the plaintiff in error to collect of the defendant in error the sum of $22,635, being the amount of an indebtedness claimed to be due from the Western Union Telegraph Company for the maintenance, upon the streets and alleys of the City of St. Louis, of 1509 telegraph poles, from the first day of July, 1884, up to the first day of July, 1887. The basis of said indebtedness is claimed to be an ordinance of the City of St. Louis, No. 12,733, amending Ordinance No. 11,604 by adding certain sec-

tions thereto, it being provided under Section 11 of said amendatory ordinance "that all telegraph and "telephone companies, which are not by ordinance "taxed on their gross income for city purposes, shall "pay the City of St. Louis for the privilege of using "the streets, alleys and public places thereof, the sum "of $5 per annum for each and every telegraph or tele-"phone pole erected or used by them in the streets, "alleys and public places in said city." (Record, p. 6). By the amended answer, in paragraph 1, an issue of fact was made to the effect that the City of St. Louis "was "wholly without authority of law to pass and enact "Sections 11, 12, 13 and 14 of Ordinance No. 12,733, "in said petition set forth, and was wholly without "authority to pass and enact Sections 71, 72 and "74 of the 28th Chapter of the Revised Ordi-"nances of 1887, in the said petition set forth, "and said sections of said Ordinanee No. 12,733 "of said Revised Ordinances are wholly illegal "and void, as in contravention of the Constitution "and laws of the said State of Missouri and of the Con-"stitution and laws of the said United States."

Under this answer the defendant put in issue the right claimed by the city, in enacting the ordinances, to the control of the streets and alleys within its limits. The answer further denied that the defendant had, from the first day of July, 1884, up to the filing of said petition the number of telegraph poles alleged in the petition, upon the streets and alleys of said city, and denied further the indebtedness as claimed in the petition.

Upon the trial of the case, to the Court without a jury, judgment was entered for the defendant, whereupon the plaintiff in error sued out a writ of error to this Court, and the same came on and was argued before this Court on or about the 15th day of December, 1892, and was decided by this Court, and opinion delivered under date of March 6th, 1893.

In the opinion in said cause, delivered by Mr. Justice

BREWER, the judgment of the Circuit Court was reversed, and the right of the City to sustain this action was maintained upon the ground that the said charge of $5 per annum for each pole within the streets of the City of St. Louis, was not in the nature of a tax upon the property of the defendant, or in the nature of a privilege or license fee, but that the same was in the nature of a charge for the use of property belonging to the city, and might be properly called a rental paid by the Western Union Telegraph Company for property which it occupied in the City of St. Louis belonging to the City. The opinion of the Court treated the streets and alleys as a part of the property of the city, and sustained the right of the city to charge the defendant The Western Union Telegraph Company a reasonable sum for the use of this property occupied by the poles of that company. The doctrine thus announced by the Court is of extreme moment to this defendant, because it maintains in every city, large and small, within the limits of the United States, poles and wires, and already, in the State of Missouri and in other States, municipalities moving thereto by the decision of this Court in this case are taking steps to impose upon this defendant large obligations under the guise of a rental, claiming to be acting within the principles of the opinion in this case.

The Western Union Telegraph Company respectfully states that it is prepared to show that by the charter of the City of St. Louis no proprietary rights are given to that city, in the streets thereof; that the record in this case and the laws and Constitution of Missouri clearly establish the proposition that the control and ownership of the streets in said city is vested in the State of Missouri and that the legislature thereof has fully invested The Western Union Telegraph Company with power to erect and maintain its poles upon the streets and alleys of said city, and has simply conferred upon the City of St. Louis the right to regulate the manner in which the said telegraph com-

pany shall occupy the said streets in three particulars, to wit: (1) the place where the poles shall be located; (2) the kind of poles that shall be used; and (3) the height at which the wires shall be run. The defendant in error is also prepared to demonstrate to the Court that upon the argument of this cause the Statutes and Constitution of Missouri establishing this proposition were fully and carefully cited to the Court in oral argument by Mr. John F. Dillon, counsel of plaintiff in error.

From the following words from the opinion filed in this cause, "We do not understand it to be ques- "tioned by counsel for the defendant that, under the "Constitution and Laws of Missouri, the City of St. "Louis has the full control of its streets in this "respect and represents the public in relation thereto," it is evident the Court has entirely overlooked the position of counsel for defendant in error upon the fundamental question in this cause as presented in the argument at the bar. The position of the Telegraph Company has been at all times during the progress of this cause, not only that the City of St. Louis does not, under the laws of Missouri regulating telegraph companies, and their use of streets and highways, represent the public in relation to the streets and alleys and has not the full control thereof, but that no such control is given to the City of St. Louis as the Court understood the counsel for the defendant to concede; that it has no property rights in the said streets and alleys which are acquired by the defendant from it or used by the defendant in the occupation of said streets and alleys by its poles. In addition thereto that the State had long prior to the action of the said city fully granted and confirmed to the defendant, The Western Union Telegraph Company the full right and power to occupy the said streets and alleys free from any interference by the said city, save in respect to the right to regulate the telegraph company in the use thereof in

the three particulars above named, to wit, the place where the poles shall be put, the kind of poles, and the height at which the wires should be run. So far from conceding the position stated by the Court with respect to the City of St. Louis, the counsel for the defense, in the oral argument, conceived their fundamental defense in this case to be, that, inasmuch as the sovereign power, to wit, the State of Missouri, had by public statutes expressly granted the right to the defendant to occupy the said streets with its poles, therefore, any action by the city in the way of interfering with such right, or in theway of charging a pecuniary consideration for the exercise of it was not within the powers conferred upon the City of St. Louis, and could not be considered and treated as valid action by the city.

Upon a rehearing of this cause the counsel for defendant in error would be prepared to sustain that position by a reference to the Constitution and statutes of the State of Missouri, and also by a reference to decisions of the Courts of Missouri upon this subject, construing the statutes of said State. The legislation of the said State of Missouri, from the year 1851 down to the date of the passage of the ordinances relied upon by the City, as contended for by defendant's counsel, and as cited in detail, upon oral argument, demonstrates (as counsel for defendant in error insist) that the City of St. Louis does not represent the public in respect to the control of said streets, and has not, and never has had, such control of the same. In addition thereto, the Scheme and Charter of the said City of St. Louis, in no part thereof, purports to confer upon the city an ownership of the said streets, or alleys or proprietary rights of any character therein such as would justify the conclusion of the Court that the City is in a position to charge a rental for the space occupied by poles of the defendant in error located upon the said streets. As showing the position of counsel for defendant

upon the oral argument of this case, that under the constitution and laws of Missouri full power was given by the State to the defendant to occupy these streets, and that the City of St. Louis has not the full control of said streets, and does not in this respect represent the public in relation thereto, defendant in error submits herewith copy of the notes of Mr. JOHN F. DILLON, from which his oral argument was made, with reference to the statutes of the said State conferring the right upon any and every telegraph company to construct its lines upon streets and highways free from interference and control by municipal authorities, except in the matter of regulation in three particulars, only, viz.: Location of poles; kind of poles, and height of wires.

" Legislation.

" **Act 1851, p. 286, Rev. St. Mo. (1855), p.** " **1520,** gave any and every telegraph corporation " *right* to construct lines upon highways (Sec. 2) " subject to regulation (Sec. 3):

" 1. Location of posts.
" 2. Kind of posts.
" 3. Height of posts.

" Public character of streets, 2 Dillon, Secs. 656, 657.
" Do. Mo., Smith's Brief, p. 24.

II.

" 1865. Had a large plant in the city (Record, p. 36).
" 1848. Telegraph introduced.
" **Rev. Sts., 1865.** Went into effect August 1, " 1866 (Rev. Stats., 1865, p. 882).
" July 24, 1866. Act of Congress, Secs. 5263, 5266, " 5268.
" June 5, 1866. Accepted by defendant, p. 19 (ad- " mitted); p. 45 (proved).
" Mo. Rev., 1865, p. 349 (Smith's Brief, p. 23). Sec. " 5, p. 349, same as 1851, except limited to domestic " corporations. But Sec. 14, p. 351, gives power to " specify location, character and height of posts.

" **Rev. St. Mo. 1879** (Smith's Brief, p. 23) : Sec. " 879, p. 158, same as Sec. 5, 1865, except inserts 'tele- " phone.' Sec. 888, p. 159, same as Sec. 14, Act 1865, " except adding 'telephone.'

" **Scheme & Charter** Scheme & Charter (Rev. " St. 1879) : Const. 1875, Art. 9, Sec. 20, authorizes " this scheme; *this to be in harmony with Constitu-* " *tion and general laws.* Const. 1875, p. LXXVIII, " Secs. 20, 23, 25. Powers in Scheme & Charter " (Smith's Brief, pp. 16, 19) : Sec. 26, p. 1585 (Deft.'s " Brief, p. 35), par. 1 (not relied on by defendant). " Par. 2 (relied on). Par. 5 (relied on) as a business " tax.

" Telegraph Taxing Act, 1877 (Laws 1877, p. 391) : " Scheme and purpose of that act construed (Smith's " Brief, p. 21, St. Jo case; State vs. Severance, 55 Mo., " 378; Marshall Brief, p. 50). We have paid all *taxes* " under Act 1877.

" In the condition of legislation :—

I

" Ordinance 1881 (Record, p. 4).

" 1. Irrepealable contract (Smith Brief, Point 2, p. 9) " at least a defense while city enjoys consideration.

II.

" Ordinance March 22, 1884, imposing $5 per pole " *tax for using of street* (Record, p. 6).

" City rests this case on the proposition that it may " charge for the privilege of using *its* streets (Marshall " Brief, p. 38, 41, 48). No charter power to do this. " This is an ordinance for revenue, and $5 per pole is a " license *tax* upon defendant for privilege of carrying " on its business in the city (Brief, Point III., p. 73).

No Power.

" 1. All power to *tax* taken away by Act of 1877. " That act eliminates the word 'tax' from Par. I., Sec. " 26, 'scheme & charter,' p. 1585; also eliminates 'tax' " from paragraph 5, so far as both 'property' and " 'franchises' are concerned.

" If 'tax' eliminated from Par. 5, only 'license' and " 'regulate' are left.

" This does not authorize a revenue tax.
" This is Missouri law. (Smith Brief, p. 26, p. 24).
" Power to 'license' useful occupation does not
" authorize license as a mode of taxation for revenue.
" Cooley, S. P. (Smith Brief, p. 15).
" Mo. S. P. (Smith Brief, p. 27).
" Dillon, Secs. 357–359 & cases.
" *Ib.*, Secs. 763, 764–5, 768, 682.
" See St. Louis vs. Speigel, 75 Mo. 145.
" Power to 'regulate;' the only charge is actual cost
" of regulation: St. Louis vs. Ins. Co., 47 Mo., 150;
" Smith brief, p. 27.
" If not eliminated it is because no conflict
" between the two kinds of taxes and the right to
" tax 'business' remains. But this ordinance does not
" profess to tax business, but only for use of streets—
" and no such power is given by paragraph 5."

In the printed brief ("Smith's Brief") also filed in the case for the defendant in error, at pages 23 to 26, there is a discussion of the power of the city and a reference to the Missouri authorities, and a denial by the defendant in error of any power in the city to affect the poles of the defendant in error, except in the three particulars named and which have already been referred to.

Under the legislation above cited, and pursuant to the foregoing statutes, the lines of telegraph of the defendant in the City of St. Louis were erected and maintained, and therefore this case is an attempt to exact a rental on behalf of the city for privileges and rights granted to the telegraph company by the sovereign power of the State, and that too when the city charter confers no power to exact such rental.

Counsel sincerely regret that a sense of duty constrains them to trouble the Court with this application, and the more so since they feel that their failure to impress the Court with their contentions was due to their

not having put in print their views of this fundamental question, and thus preserve in permanent form, for the use of the Court in the subsequent consideration of the case, both the statutes relied on, and the position of counsel. When the three counsel of the telegraph company who were present at the oral argument in this Court met for conference the day before the argument, they felt the importance of calling the attention of the Court specifically to the express—and, it is perhaps not too much to say, peculiar—legislation of Missouri on this subject. There was no time to put the results of this conference in print before the argument came on, and it was accordingly made by Mr. Dillon at the bar from the notes above referred to. "Smith's Brief" referred to in said notes refers to the brief for the defendant in error signed "Dickson & Smith," but understood to have been prepared by Mr. Smith, who was present at and took part in the oral argument.

It is respectfully submitted to the Court that, under this legislation, the right and authority of the telegraph company to use the streets of the city is conferred upon it directly by the State. It is therefore a right which the defendant company claims not under the charter of the city, but under the general legislation of the State —a right therefore derived directly from the State and in no sense derived from the city. It is furthermore respectfully and earnestly suggested to the Court that if this is so, and the opinion is to stand as it is, it affirms a right in a subordinate municipality, notwithstanding and in the face of such legislation, to exact payment in the nature of a rental, a proposition which is novel, and which if it is held to be law should only be so held after the most thorough argument and mature consideration. Counsel beg to repeat that they are moved to this course solely because they are under a double duty to the Court and to their client, since, if no rehearing be granted and the opinion stands unmodified as it is before the case can be heard again in the Court of Appeals, action similar to that taken by

the City of St. Louis in exacting rental under statutes similar to that of the State of Missouri will be extensively adopted in other States, and the defendant will be put to multiplied litigations and enormous expense, and, moreover, the appellate jurisdiction over the judgment on the retrial will probably end with the Circuit Court of Appeals. This Court will be bound in fetters of iron by your honor's opinion, as you shall leave it in this case, and with probably no right to revise that opinion in this Court under the existing law regulating writs of error and appeals from the Circuit Court of Appeals.

For these reasons the defendant in error respectfully presents this petition for a rehearing, and prays that such rehearing may be granted at an early date to be fixed by the Court.

Respectfully submitted,

JNO. F. DILLON,
RUSH TAGGART,
Of Counsel for Western Union
Telegraph Company.

We hereby certify that we are counsel for the defendant in error in the above-entitled cause; that we have made a careful examination of the record and argument in this case, and of the legal questions involved therein, and it is our opinion that, in justice to the defendant in error as well as on account of the magnitude of the interests affected by the decision in the case, this case ought to be reheard.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel for The Western Union
Telegraph Company.

APPENDIX.

MISSOURI LEGISLATION.

Act of February 22nd, 1851.

Sec. 1. Every company for the transmission of intelligence by electricity, which now is, or may be, incorporated, and every owner or association which may be engaged in telegraphing for the public by electricity in this state, shall be subject to the liabilities and governed by the provisions contained in this act.

Sec. 2. Any company incorporated for the purpose may construct lines for [of] electric telegraphs upon and along any of the highways and public roads, and across any of the waters, within the limits of this state, by the erection of necessary fixtures, including posts, piers or abutments, for sustaining the wires of such lines: provided, the same shall be so constructed as not to incommode the public use of said highways or roads, or endanger or interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this state.

Sec. 3. The mayor and aldermen of any city, and the trustees of any incorporated town, through which the lines of such company are to pass, either by ordinance or by writing, may specify where the posts may be located, the kind of posts that may be used, the height at which, and the places where, the wires may be run, and such company in erecting their line shall be governed by the regulations therein prescribed. After the erection of said telegraph lines, the said mayor and aldermen, and trustees, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also the height at which the wires shall

run, having first given such company, or their agents, opportunity to be heard on such alteration.

* * * * * *

Approved February 22, 1851.

REVISION OF 1885, PAGE 1520.

SECTION 1. Every corporation, owner or association engaged in telegraphing for the public, by electricity, in this State, shall be subject to the liabilities, and (be) governed by the provisions contained in this act.

SECTION 2. Any company incorporated for the purpose may construct lines of electric telegraph upon and along any of the highways and public roads, and across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the wires of such lines: *Provided*, The same shall be so constructed as not to incommode the public use of said highways or roads, or endanger or interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this State.

SECTION 3. The mayor and aldermen of any city, and the trustees of any incorporated town through which the lines of such company are to pass, either by ordinance or by writing, may specify where the posts may be located, the kind of posts that may be used, the height at which and the places where the wires may be run; and such company in erecting their line shall be governed by the regulations therein prescribed. After the erection of said telegraph lines the said mayor and aldermen, or trustees, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company, or their agents, opportunity to be heard on such alteration.

REVISION OF 1865, CHAPTER 65.

SEC. 5. Companies organized under the provisions of this chapter, for the purpose of constructing and maintaining magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters.

* * * * * *

SEC. 14. The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town through which the lines of any telegraph company are to pass, may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kinds of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such operation.

REVISION OF 1879.

Sec. 879. *Privileges in constructing line.* Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires, and other fixtures along and across any of the public roads, streets and waters of

this State in such manner as not to incommode the public in the use of such roads, streets and waters. (G. S. 349, Sec. 5 amended).

* * * * * *

Sec. 888. *Mode of construction may be directed by whom.* The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town through which the lines of any telephone or telegraph company are to pass, may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run, and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration. (G. S. 351, Sec. 14, amended).

SCHEME AND CHARTER.

(CITY OF ST. LOUIS).

Sec. 26. *Powers of Mayor and Assembly.* The mayor and assembly shall have power within the city, by ordinance, not inconsistent with the constitution or any law of this State, or of this charter:

FIRST. To assess, levy and collect all taxes for general and special purposes, on real and personal property and licenses; to borrow money on the faith and credit of the city, by the issue or sale of bonds or notes, for such amounts, and for such time, and for such purpose

as may be required for current expenses, and for payment of maturing bonds; but no note for the purpose of borrowing money shall be made or issued for any longer period than twelve months; to appropriate the money of the city for legitimate purposes and provide for its debts and expenses.

SECOND. To establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for grading, lighting, cleaning and repairing the same, and to condemn private property for public uses, as provided for in this charter, to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof, and to confine, wall up, cover over, alter or change the channel of water courses, to establish and maintain water-works for fully supplying the city with wholesome water, and to distribute the same for public and private uses in such manner and upon such terms as shall be provided by ordinance; to establish and maintain a sanitary system, a system of police and a fire department, provided that no system of police shall be established or maintained other than the present metropolitan system as long as the same is established by law.

* * * * * *

FIFTH. To license, tax, and regulate lawyers, doctors,

* * * * * *

telegraph companies or corporations; * * * to license, tax, regulate or suppress all occupations, professions and trades not heretofore enumerated, of whatever name and character.

SEC. 656 (518). Public Nature of Streets and Extent of Legislative Control. Public streets, squares and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situated within the limits of the latter, and because the legislature may have given the supervision, control and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint and subject (according to the weight of more recent judicial opinion) to the property, rights and easements of the abutting owner, full and paramount authority over all public ways and public places. "To "the commonwealth here," says Chief-Justice GIBSON, "as to the King in England, belongs the franchise of "every highway as a trustee for the public; and streets "regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, "railroads, canals, or public roads laid out by authority of the quarter sessions."

The legislature has power to determine where and when streets shall be constructed, their width and mode of improvement, and its action in these respects cannot be reviewed by the courts. It may adopt and sanction an improvement or expenditure which it could previously have authorized, and it may authorize an assessment for an improvement after the improvement is made.

* * * * * *

Sec. 657 (519). Legislative Power over Streets. By virtue of its authority over public ways the legislature may authorize acts to be done in and upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, tel-

egraph and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may constitutionally authorize to be done is, of course, lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances; if they were such without they cease to be nuisances when having the sanction of a valid statute. As respects the public or municipalities there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted. What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others is a subject which is elsewhere considered in this chapter. Statutes authorizing or legitimating acts and obstructions upon the highways which would otherwise be nuisances are strictly construed and must be closely pursued, and the authority given must be exercised with proper care.

Office Supreme Court U. S.
FILED.
APR 27 1893
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

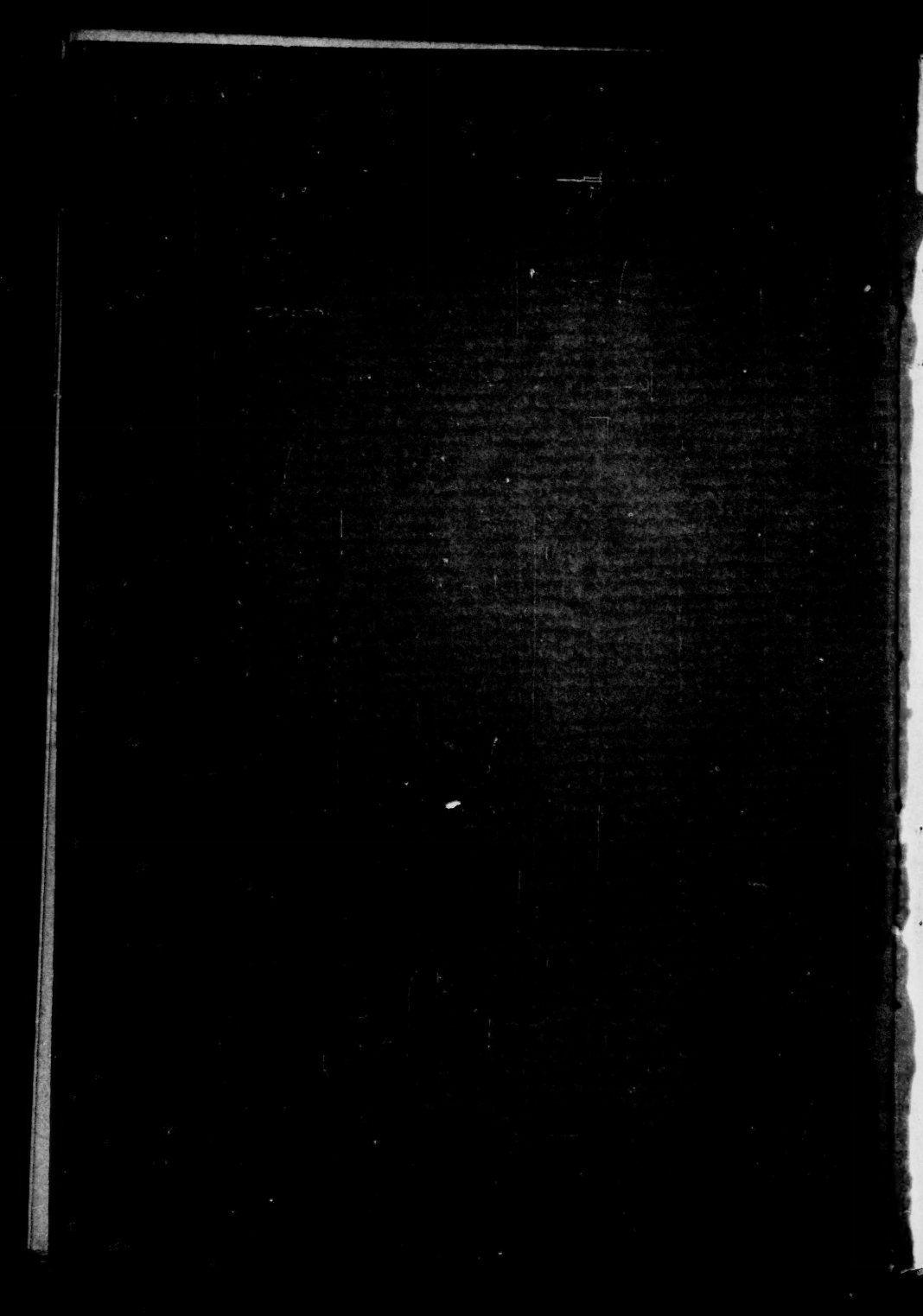
THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

No. 94.
October Term, 1892.

Brief and Supplemental Brief for Defendant in Error on Rehearing ordered by the Court April 17, 1893.

JOHN F. DILLON,
RUSH TAGGART,
ELENENIOUS SMITH,
Of Counsel for Telegraph Company.

C. G. BURGOYNE, Cor. Centre and Walker Sts., New York.



SUPREME COURT OF THE UNITED STATES.

CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

ARGUMENT AND BRIEF ON REHEARING.

The Question.

The Court has granted leave to file a brief on the question "Whether the City of St. Louis has such "interest in and control over the streets, alleys and "public places within its limits as authorizes it to im- "pose upon the Telegraph Company a charge in the "nature of rental for the exclusive use of portions "thereof in the manner stated."

The opinion of this Court reversing the judgment of the lower Court is in general words based upon the assumption that the City of St. Louis possesses such title to and interest in its streets as authorizes it to

rent or lease, permanently, portions thereof for telegraph poles, and charge rental therefor.

The Court likens the nature of the rental charge which is imposed upon defendant in error for each and every pole permanently placed in the streets, alleys and public places of the city, to rental that may be exacted by the city for the use of a booth in a park in which to sell fruit, etc., or the rental of a room in the City Hall, or other public building.

It is perfectly clear from the opinion that it was the belief and understanding of this Court, when its judgment was reached, that the right, title and interest of the City of St. Louis in its streets was identical with its right, title and interest in its City Hall, parks and other public buildings and places.

And the Court uses this language :

" We do not understand it to be questioned by coun-
" sel for defendant that under the constitution and
" laws of Missouri, the City of St. Louis has the full
" control of its streets, and in this respect represents
" the public in relation thereto."

It is important, before entering upon the detailed inquiry involved in the one point upon which a rehearing is granted, to make another short quotation from the opinion :

" Indeed, it may be observed in the line of the
" thoughts heretofore expressed, that this charge is
" one in the nature of rental ; that the occupation by
" this interstate-commerce company of the streets can-
" not be denied by the city."

Both the majority and dissenting opinion concur in the proposition that the charge in question is not and cannot be sustained as " a privilege or license tax." It is confessedly not a property tax, for the record shows that the telegraph company has been regularly assessed

for taxation upon its *property* and *franchises* and has paid the taxes. All attempt to sustain the charge as a tax or as the exercise of the taxing power being out of the case, the only question remaining is whether the charge is one not governmental, but proprietary—that is, one which the city as propietor or property owner may require for the use of its property. Hence, the question submitted is whether it can make a "charge in the nature of rental" to the telegraph company for the use of its streets.

And to the discussion of this novel question, for the case is one of first impression, we strictly limit ourselves.

At the outset we may say that it was the intention of counsel representing the defendant in error to most seriously contest the full and absolute control by the City of St. Louis of its streets irrespective of superior control by the "public," or its representative, the Legislature of the State. There is no principle of law affecting the City of St. Louis better or more conclusively settled by the decisions in Missouri than that, with respect to its streets, the city is subject to the superior control of the Legislature; and is limited in its rights and powers with respect to the streets, to such powers as have been expressly delegated by its "Scheme and Charter," or by legislative acts applicable to the city.

Constitutional and Legislative Provisions.

The organic law of the City of St. Louis is the **"Scheme and Charter,"** which was adopted in August, 1876. It will be found at the end of the Revised Statutes of Missouri of 1879, or in the Revised Statutes of 1889, beginning at page 2073.

Section 23 of Article IX. of the Constitution of Missouri of 1875 provides, in speaking of the contemplated "Scheme and Charter," that "*such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri.*" St. Louis is not an *imperium in imperio*, but subject, like every other city and town, to the full measure of legislative power and control.

So far as the present question is concerned there are no laws of a general character passed subsequent to the adoption of the "Scheme and Charter" which affect the power possessed by the City of St. Louis with respect to its streets. We must, therefore, look exclusively to the provisions of the "Scheme and Charter," and to the decisions of the Appellate Courts of the State, in order to measure the interest of the City of St. Louis in its streets, and its power and authority with respect to the same.

Section 10 of the "Scheme" (R. S. Mo., 1889, p. 2078), provides:

"All the public buildings * * * and all the "right, title and interest of the County of St. Louis in "said property, and *in all public roads and highways* "*within the enlarged limits is hereby vested in the City* "*of St. Louis, and divested out of the county.* * * *"

So that the City of St. Louis was simply given the right, title and interest which the County of St. Louis possessed before the separation of the city and county.

Section 1 of the "Charter" (R. S. Mo., 1889, p. 2085) defines the purposes for which the City may purchase, receive or hold property, real or personal, within the city, such as grounds for the burial of the dead, erection of water works, gas works, hospitals, workhouses, etc., and gives the city power "to sell,

lease or otherwise dispose of any property for the benefit of the city." In respect to the authority granted by Section 1 it will be apparent under the decisions hereinafter cited that the language there used limits the right of the City to sell, lease, etc., property, to property of the kind mentioned in the section, to wit, such as may be acquired in fee, or otherwise, for workhouse, hospital and other purposes, etc., and in no way affects the streets of the city.

Paragraph 2 of Section 26, Article III. (R. S. Mo., 1889, p. 2096), gives the Municipal Assembly the power to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds, etc., * * * to construct and keep in repair all bridges, streets, sewers and drains, *and to regulate the use thereof.* * * *"

Paragraph 4 of Section 26, Article III. (R. S. Mo. 1889, p. 2097), gives the Municipal Assembly the power to "sell ferry privileges within the city limits, and to establish ferry rates, * * * to set aside or lease portions of the unpaved wharf for special purposes. * * *"

Paragraph 14 is the general welfare provision in the usual language.

By the provisions of **Section 1, Article X.** (R. S. Mo. 1889, p. 2131), the Municipal Assembly is given power by ordinance to determine all questions arising with reference to street railroads in the corporate limits of the city, involving construction of such street railroads, the granting of the right of way, the regulating and controlling them, and "*also shall have power to sell the franchises or right of way for such street railroads to the highest bidder,*" etc.

These are the only provisions, so far as we know or can find, express in their nature respecting the control by the City of St. Louis of its streets or its power to grant interests therein. The only other act which we have discovered at all affecting the control by the city of its streets, is the act of **March 6th, 1887,** (Laws of Mo., 1887, p. 40) which requires all cities, before granting any right of way over, on or under any street or alley, etc., to any street railroad, to require damages, etc., to abutting owners to be fixed, etc.

The usual general power in the incorporating act of the city of 1831 to regulate the use of streets, which power is contained in all subsequent incorporating acts, including the " Scheme and Charter " of 1876, cannot be held to control the special legislation of February 22, 1851 (continued by successive revisions down to this date, as shown in the supplemental brief herewith filed), *conferring specifically upon telegraph companies the right to use the streets* of a city, and limiting the regulations which the city may make on this subject, which specific regulations exclude the right to impose a rental.

It was contended on the main argument, and may be again, that the Constitution of 1875, and the Scheme and Charter vest absolute title in the city to its streets. It will be seen by reference to the foregoing constitutional and legislative provisions that there is no ground for this contention, and it will be further seen by the Missouri decisions to which we shall presently refer that such a contention has been time and time again denied by the Supreme Court of Missouri by decisions made since the Scheme and Charter was adopted. As all interests and rights are classified in the Scheme and Charter, there has been

no occasion for special acts, and few, if any, have been passed, except the said Act of March 6, 1887, above mentioned.

Section 20 of Article 12 of the Constitution confirms the foregoing views and conclusions, by ordaining that the General Assembly shall not grant the right to construct and operate a street railroad within any city, town or village, or on any public highway, without first acquiring the consent of the local authorities. A specific constitutional limitation on the General Assembly as to street railways shows that in other respects where the Legislature is not so limited its general power and supremacy exist.

It will be noticed that in the following argument we have not referred at all to paragraph 5, Section 26, of the Scheme and Charter, which gives to the city the power to license, tax and regulate the telegraph companies, &c., &c. We have not done so because it is obvious that the power there given is one merely with respect to the business of the company and is not embraced within the question which is submitted, upon which reargument is permitted. Besides which, we understand both the majority and minority opinions concur, in the view that the charge in question cannot be supported as a tax.

If the city counsel shall refer to any other acts, we cannot refer to or discuss them, for we have not seen his brief.

Missouri Decisions.

The Supreme Court of Missouri, in the case of the City of St. Louis vs. the Bell Telephone Co., 96 Mo., 623, has had occasion to interpret the meaning of the only express power delegated to the City of St.

Louis with respect to its streets under paragraph 2 of Section 26, Article III., already quoted; to-wit, the power to regulate them. In that case it was claimed that under the power expressly given the city "to license, tax and regulate telephone companies" and to "regulate the use" of the streets, the city had the power to fix rates to be charged by the telephone company for its service. The Court denied the assumed right, and say: "The power 'to regulate' it may be conceded gives the city the right to make *police regulations* as to the mode in which the designated employment shall be exercised."

The claim made in that case that the "general welfare clause" would sustain the attempt to establish the rates was also denied. This may be important to note if there should be any attempt by the city to sustain the charge in question under the "general welfare" clause.

In the case of **Julia Bldg. Assn. vs. Bell Tel. Co.,** 13 Mo. App., 477, affirmed 88 Mo. Rep. 258, the telephone company, under the general statute of the State, to which reference will be hereafter made, attempted to place its poles in one of the streets of the city, and the proceeding was one to enjoin the erection of the poles. Speaking first of the right of a telegraph company under the general act mentioned to place its poles in the streets of the city, the Court say:

"It is further apparent from the opinion referred to "(12 Mo. App. 485) that a telegraph company con- "forming to the *regulations* established by our existing "statutes and by municipal ordinances in St. Louis "may lawfully plant and maintain its poles on the side- "walk of a public street, notwithstanding their "measurable obstruction of the thoroughfare, and not- "withstanding incidental hindrances or detriment to "the owners of abutting property, provided only that

"the work be done in a careful and proper manner, "etc. * * *"

"It is not to be questioned that the powers con- "ferred by *legislative authority* upon telegraph or rail- "way companies to use the public streets for the "constructions adapted to their respective enterprises "must stop at any invasion of the rights of private "property until adequate compensation to the sufferer "shall have been secured. * * *"

The Court, in this case, which was elaborately considered, in speaking of the power of the City of St. Louis to surrender to a mere private interest a right in one of its streets, uses this language:

"A more important question, however, lies behind "all this. Has the municipal corporation power to "surrender, on any terms, to a mere private interest a "proprietary right in or under a public street to the "effect of excluding the enjoyment of a public use "which was contemplated in the dedication? The "city authorities are empowered, generally, to open, "alter, widen, or even, under certain conditions, to abol- "ish a public street. But in the exercise of these func- "tions there is an abiding necessity that every act "shall have a direct reference to the common weal. "Their acts, when so designed, may not be avoided by "mere errors of judgment. The terms of their agency "will be fulfilled so long as they apply their best dis- "cretion to the employment of measures for the com- "fort, convenience or needs of the community. But "suppose these officers should grant a lease of an en- "tire street to a private person or corporation, with a "possessory right to enclose it against all passers, and "this without any pretence of benefit to the city or the "public at large. Can it be doubted that the monoply "would be absolutely void, and that the lessee could "never procure its protection or enforcement by "judicial aid? Surely not. It would be in direct "violation of the terms of the dedication, and there- "fore not within the powers conferred upon the holders "of the trust. *What is true of the whole must be true "of a part, whether this part be on or under the surface.* "The public right of passage would always be held "paramount to the proposed monoply or private grant, "and no reason can be shown why any other public

" right secured in the same dedication could not be " alike supreme."

This case, on appeal to the Supreme Court of the State, was affirmed in the 88th Mo., p. 258.

In **Glasgow vs. The City of St. Louis,** 87 Mo., 678, which arose subsequent to the adoption of the " Scheme and Charter," the Municipal Assembly, under the charter powers which have already been quoted, undertook to vacate a portion of Papin street, in the City of St. Louis, and devote it, for the period of twenty years, to the private use of a corporation at a fixed price, the street, at the expiration of that time, to again fall within the control of the city. The Supreme Court denied the assumed power of the city, and held the ordinance invalid, saying :

" The charter provision invoked to sustain the ordi- " nance confers no such power as was exercised in its " passage. The streets of the city are held by it " IN TRUST FOR THE PUBLIC FOR STREET USES AND " PURPOSES, and none other. [This shows that the legal " status of the streets in St. Louis is the same as else- " where in the United States.] This precise question " was carefully considered in the case of Belcher Sugar " Refining Co. vs. St. Louis Grain Elevator Co., 82 " Mo., 127, where it is held that ' it would not do to " permit property condemned for one purpose to be " used for another and different purpose, or property " condemned for public use to be appropriated for pri- " vate use. The latter can no more be done than could " the property in the first instance have been con- " demned for such use.' "

In Belcher Sugar Refining Co. vs. St. Louis Grain Elevator Co., 101 Mo., 192, the question considered was as to the right of the City of St. Louis to exact a certain lease for unpaved portions of its wharf. The charter expressly gives the city the right to lease such unpaved portions, providing the

lease does not extend beyond fifty years, etc. [There is no such provision as to the streets and alleys of the city.] The Supreme Court sustained the particular lease on the ground that the contemplated use was one incident to the wharf, but held that the city has no power to dispose of property condemned for wharf purposes for private uses, or to any use inconsistent with or different from that for which it was condemned.

It is important to notice that the city does not acquire the fee in property condemned or dedicated for public use; the fee is in the owner, subject to the rights or easements of the public. This is held by the Supreme Court of Missouri in the case last cited (101 Mo. Rep., 192). Thus the Court says (p. 125):

"*The fee simple title was not acquired by the city* "*under the condemnation proceedings*, and all the com- "pensation plaintiff received was for the use of his "property for a public wharf. If any burden other "than that is to be imposed upon it by the City of St. "Louis, the plaintiff must first be compensated for "such additional different use. The City of St. Louis "has no right to erect a permanent building upon the "property condemned, except for the use of the wharf, "so occupied and of the building so erected for legiti- "mate wharf purposes. The Legislature of the State "could not authorize any other use of the property of "the city than that for which it was condemned."

In 1860 the Supreme Court of Missouri in

Lackland vs. N. Mo. R. R. Co., 31 Mo., 185,

took occasion to declare, in language which has never been modified in this State, but repeatedly approved, the superior and controlling power of the Legislature over the streets of cities as well as other public highways of this State. It adopted the language of Chief-

Justice GIBSON in Philadelphia and Trenton R. R. Co. (6 Whart., 44):

"A highway is the property of the people, not of a "particular district, but of the whole State, who, con- "stituting, as they do, the legitimate sovereign, may "dispose of it by their representatives and at their "pleasure. Highways, therefore, being universally the "property of the State are subject to its absolute "direction and control."

The Supreme Court of Missouri, proceeding, says:

"The learned Judge recognized no distinction be- "tween streets in incorporated cities and public high- "ways. He declared them all 'subject to the "paramount authority of the Legislature in the regula- "tion of their use by carriages, rail cars or means of "locomotion yet to be invented.'"

Thus Missouri adopts the general doctrine that the State is the sovereign over all streets and highways. See further quotation from Chief-Justice GIBSON'S opinion in supplemental brief herewith filed in extract there given from Section 656, Dillon on Munic. Corp.

In Glaessner vs. Anheuser-Busch Brewing Assn., 100 Mo., 514, the Supreme Court was again called to pass upon the extent of the authority conferred upon St. Louis by the charter provision mentioned, *to regulate the use* of its streets. The Court says:

"We have held that this power to regulate the use "of streets is not limited to the mere right to regulate "travel thereon, but under it the city may authorize "the laying of gas, water and sewer pipes, and all "such like uses as the public good and convenience "may require. * * * "

[Note that these are all street uses proper.]

And in the recent case of the *Julia Bldg. Assn. vs. Tel. Co.*, 88 Mo., 258, it was, among other things, in substance, said, that

" When the public acquires a street by condemna-
" tion, grant or dedication it may be applied to all uses
" consistent with and not subversive of the use con-
" templated by the grant, dedication or condemnation."

It was accordingly ruled that the erection of telephone poles was a proper use of the street, but the ruling is based upon the ground and can stand upon no other, that the use was a public one. *The case furnishes no authority for the proposition that under the general power to regulate the use of streets the city may devote a street or any part thereof to private use.*

The case of Cummings vs. City of St. Louis, 90 Mo., 259, involved the question as to the right of the city to dispose of a portion of street which formed part of a common dedicated to the city for public use as such. The Court, again considering the power of the city under the charter provisions which we have heretofore referred to, said:

" The city may control and regulate that use, but it
" has no right to sell the property and devote it to
" private use, and thereby destroy the trust created for
" the benefit of the public." [What is a lease but an
" alienation—a sale *sub modo.*] " We have held that the
" City of St. Louis could not lease unconditionally for a
" term of years for the prosecution of private business
" property acquired by condemnation for a wharf (The
" Belcher Sugar Refining Co. vs. St. Louis Grain Ele-
" vator Co., 82 Mo., 122). The same is true with
" respect to these streets and the common in question.
" It must follow that the proposed out-and-out sale is
" a flagrant abuse of the trust reposed in the city, and
" without any warrant or authority of law."

And in Matthews vs. City of Alexandria, 68 Mo., 115, authority was given the city by its charter to "erect, repair and regulate public wharves," etc. An attempt was made to lease the wharf and farm out

its revenues. The Court denied the right of the city to do this, saying:

"No authority was given by the charter to the city to "lease the wharf or farm out its revenues, or to em- "power any one else to fix the rates of wharfage. All "these things were attempted to be done by the con- "tract under consideration, and being wholly unau- "thorized, the contract was illegal and void. The "legislative authority of the city could not be dele- "gated, nor could the city abdicate its control over "the public property held in trust by it for the benefit "of the public."

[If a city has no implied power to lease its wharves, how can it be affirmed that it has such power in respect of its streets?]

The case of Farrenbach vs. Turner, 86 Mo., 418, involved the right of the city to abolish wells which, with the consent of the city, had been dug in the public streets. The Supreme Court sustained the right of the city under the power to regulate, saying:

"The Legislature represents the public at large, and "has paramount authority over all public highways, no "matter how acquired. This authority may be, and is to "a large extent, delegated to the City of St. Louis over "the streets therein. The power to regulate use is "not limited to a mere right of way, but it extends to "all beneficial uses which the public good and con- "venience may from time to time require, as for laying "gas, water and sewer pipes and the like."

The case of A. & P. R. R. Co. vs. St. Louis, 66 Mo., p. 256, is directly in point. This is a famous case in the jurisprudence of Missouri, and is a leading authority as to power of the State over the streets of St. Louis. The proceeding was for injunction against the city, to restrain it from interfering with a railroad company's track laid on Poplar street, in St. Louis. The right to lay the track was granted to the com-

pany's lessor by its legislative charter. Its grant came from the Legislature direct, and the city was held to have no power to gainsay the legislative grant. The same principles apply here in favor of the Telegraph Company, and are conclusive against the city in this case. The decision in that case establishes the paramount authority of the Legislature over the streets of the city, and the absolute lack of power on the part of the city to place any restraint or burden upon a privilege, in connection with such streets, granted to a public enterprise by the State. The Court, through HENRY, J., says:

"The assent of the city was not necessary to perfect "the right which the company acquired by the act of the "General Assembly to lay this track along the street. "The State has *absolute control of the streets in cities and* "*other public highways*, and the city has no authority, "unless it be conferred by the Legislature, to authorize "the use of any street within its limits for the construc- "tion and operation of a railroad to be traversed by a "locomotive worked by steam (Dillon on Mun. Corp., "Secs. 575, 578, 579). And, said the Court of Appeals "in this case, 'streets, in incorporated cities and other "public highways, are subject to the paramount author- "ity of the Legislature in the regulation of their use.

"Did the acceptance of the privilege from the city "to lay the track estop the company from claiming the "right to lay it under the act of the General Assembly? "The ordinance was a nullity. The city undertook to "grant a franchise which it had no authority whatever "to dispose of. Upon its face the ordinance was null "and void. The company received nothing from the "City as a consideration for relinquishing or waiving "the privilege granted by the General Assembly. The "theory upon which railroad companies have been "incorporated, with power to condemn private prop- "erty for rights of way, is that they are public, not "private, enterprises; that the public has an interest "in their construction and operation, and that the pub- "lic welfare demands them.

"Some courts have even gone so far as to hold that "they can be compelled by mandamus to build them.

"The rights of the City in its streets, and the control "which the Legislature has over them, are matters of "which the courts will take judicial notice. The City "ordinance conferred no right, and could impose *no* "*obligation upon the company inconsistent with or im-* "*pairing the franchise granted by the State.*"

See further citations from decisions in Missouri and elsewhere in supplemental brief filed herewith.

Results Summed Up.

We respectfully submit that the foregoing cases show conclusively:

FIRST. That under the provisions of the "Scheme and Charter" of 1876, as well as the charters of the city that existed prior to that date, the superior and paramount control of the streets of the City of St. Louis is in the *public* represented by the Legislature of the State.

SECOND. That the city has absolutely no power to rent, lease or in any manner convey any portion of the streets of the city for any use inconsistent with the public street uses proper.

THIRD. That the city has no power to lease or in any manner dispose of any portion of the streets for private purposes; and only so far as public enterprises are concerned to the extent specially delegated.

And those cases must show this Court that so far as a municipal corporation of the State of Missouri is concerned, *it has not the power* TO RENT *portions of the street* in the manner in which it has power to rent its unoccupied buildings, park privileges, etc.

It will not be contended that there is any express power given the city to rent or require rental for the use of any portion of its streets, excepting Section 1 of Article X, quoted *ante*, which expressly gives it the right to exact pay from "street railroad companies" for their use of the streets.

If the city wishes such power in respect of telegraph poles it must apply to the Legislature and get it. To give it the Legislature will have to repeal the existing statutes, and if it confers it upon the city it doubtless will do it under such restrictions as it thinks just. In short, the question is one for the Legislature to deal with.

The question is eminently legislative and not judicial. If the Legislature is applied to by the city, it must be presumed that it will not allow the city, like a robber baron of the Middle Ages, to levy unrestrained feudal exactions, *ad libitum*, upon the instruments of commerce and intelligence, but will, as at present, carefully restrain within proper limits any power it may hereafter grant to the cities in this respect.

The importance of the question it would be difficult to exaggerate. The last official published report of the defendant company, made October 12th, 1892, shows that it has 20,700 offices, which means that it has its lines in about 20,000 municipalities, and probably not less than a million poles within municipal limits. Within the few weeks since your Honors' opinion was promulgated in this case, the defendant company has notice that twelve municipalities have already passed ordinances on the St. Louis model, the last one being the little City of Danville which has established a rent of $6 a pole per year. It is not unimportant, and it is conceived not improper,

to refer to these facts in order that the question in all its bearings may be before the Court.

It is the settled law of Missouri that its municipal corporations possess, and can exercise the following powers and NONE OTHERS.

"FIRST. Those granted in express words.

"SECOND. Those necessarily or fairly implied in or incident to the powers expressly granted.

"THIRD. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable."

City of St. Louis vs. Bell Tel. Co., 96 Mo., 628.

FIRST. We have already shown that there is NO EXPRESS GRANT to the City of St. Louis of such control over its streets, etc., as authorizes it to impose a charge in the nature of a rental for the exclusive use of portions of the street by telegraph poles.

SECOND. No such control as will entitle the city to impose the rental charge in question can be "FAIRLY IMPLIED IN OR INCIDENT TO" the power to *regulate* which is expressly granted. This power, as the Supreme Court has held, and which holding, as will be hereafter shown, is in accord with the general law on the subject, is of a police character. It embraces the right of the city, subject, of course, to superior control of the Legis-

lature, to grant the use of the street for all proper street purposes, and to control such use by means of the ordinary police powers. The only exaction which the city can impose under a power of regulation given it, is the cost of and expense attending such regulation.

City of St. Louis vs. B. I. & T. Co., 47 Mo., 150.
Cooley's Const. Lim., 2d Ed., 586.
Cooley on Taxation, 2d Ed., pp. 597-8.
Dillon on Mun. Corp., 2d Ed., Secs. 291 and 292.
3 Ala., 137; 33 N. J., 280; 1 Ohio (N. S.), 218; 15 Ohio, 625.

But there is a stronger reason for holding that such control of the streets as involves the right to make the rental charge in question cannot be necessarily or fairly implied in or incident to the powers expressly granted. This Court, in its opinion in this case, has held, following the unbroken line of its previous decisions: "That the occupation by this interstate commerce company of the streets cannot be denied by the city." *Telegraph and telephone companies do not place their poles in the streets of the city under any power given them by the city.* Not only is this true, but the absolute right is given them by a superior power, to wit, the *public power*, through the Legislature, to erect and maintain their poles and wires along the streets of all cities of the State. This general law, which has been upon the statute books for almost forty years, will be found in Section 879 *et seq.*, R. S. Mo., 1879. [See Chronological Statement of Legislation of Missouri in Supplemental Brief herewith filed]. This superior power has also carefully defined the extent of the power of the City of St. Louis, as well

as of other cities, over telegraph companies, which are so authorized to occupy needed space in the streets for the erection and maintenance of their poles. The statute law *directly* confers the *right* upon the telegraph company to use the streets, and then precisely limits the extent of the City's power to regulate, *which limitation excludes any power to exact a rental.* The statute law declares that the sole power of the city shall be to direct where the posts, etc., shall be located, the kind of posts that shall be used, and the height at which the wires shall be run ; and the courts of the State have, by their decisions, emphatically declared that the power of the cities is limited to the matters expressly mentioned.

State *ex rel.* vs. Flad, 23 Mo. App., 186.
Hannibal vs. M. & K. Tel. Co., 31 Mo. App., 23.

In the cases of *Gay vs. The Mut. Un. Tel. Co., 12 Mo. App., 485, and Forsyth vs. The Baltimore & O. Tel. Co.*, 12 Mo. App., 494, the Court of Appeals analyzed the statute of the State which we have mentioned, as well as the ordinances then in force respecting the erection of telegraph poles. It was there expressly held that telegraph companies were authorized under the act mentioned to erect and maintain their poles by virtue of the power given by the Legislature. In the Gay case, 12 Mo. App., 494, the Court say :

" We shall not go into the question of the " power of the Legislature to authorize the " use of public highways for the purpose of " erecting telegraph poles, because that " power is conceded by the learned counsel

" for the plaintiff in this case. We have no " doubt that such a power exists."

In view of the Missouri statutes and the decisions mentioned, the Legislature having the superior control over the streets, and having authorized telegraph companies to erect their poles upon the streets, subject alone to regulation by the city as to size of poles, places for erecting same, etc., no one would contend that a municipal corporation could exact, as a condition for the placing of such poles, a charge by way of rental, whether it be a rental or otherwise. It is elementary law that a right given by a superior power may be fully exercised, free of all restrictions or impositions of an inferior power. In this connection, it may be entirely proper to mention Section 6901 *et seq.*, R. S. Mo., 1879, with respect to the taxation of telegraph property, which includes all *franchises*, for State, county and municipal purposes, through the instrumentality of the State Board of Equalization.

We submit, therefore, that it cannot be claimed, in view of the statutes of Missouri and the decisions cited, that such control by the city of the streets as will entitle it to impose the rental charge in question can be "fairly implied in or incident to the powers expressly granted."

THIRD. There remains only the third subdivision with respect to the powers of municipal corporations; namely, THOSE ESSENTIAL TO THE DECLARED OBJECTS and PURPOSES OF THE CORPORATION, not simply convenient, but indispensable.

We can conceive of no theory upon which the imposition of rent for the space occupied by telegraph

poles is indispensable to the objects or purposes of the city, and hence shall give it no consideration.

The foregoing is a consideration of the law of Missouri as contained in its statutes and decisions with respect to the question involved in this rehearing.

The Missouri Doctrine Accords with the Doctrine of this Court and of the Courts in Other States.

We shall now undertake to briefly show the Court that the general rules as laid down by the Courts of Missouri with respect to the power of municipal corporations over their streets, is in accordance with the general law, including that declared by this Court.

In Barney vs. Keokuk, 94 U. S., 340, the Supreme Court says:

> " On the general question as to the rights of the " public in a city street we cannot see any material dif- " ference in principle with regard to the extent of those " rights, whether the fee is in the public or in the adja- " cent landowner, or in some third person. In either " case the street is legally open and free for the public " passage, and for such other public uses as are necessary " in a city and do not prevent its use as a thorough- " fare. * * * "

See other cases in this Court cited in the Supplemental Brief filed herewith, and see also Barnes vs. District of Columbia, in this Court cited *infra* on this Brief.

In the case of the Marine Ins. Co. vs. St. L., I. M. & So. R. R. Co., 41 Fed. Rep., 649, Circuit Judge CALDWELL had occasion to consider the validity of the lease made by the City Council of Little Rock of one of the streets of that city. The language of the opinion by him rendered in that case is as follows:

> " I have had no difficulty in excluding the lease from

" the City Council. To say nothing about the clause " against assignment of the lease it was plainly *ultra* " *vires* and void. The streets of the city do not belong " to the council, but to the public—and by that I mean " the public at large, and not merely the inhabitants of " the city—and to their use they are forever dedicated. " The city charter makes it the duty of the City Council " to keep them open and free from nuisance. It pro- " vides that ' the City Council shall have the care, " ' supervision and control of all the public highways, " ' bridges, streets, alleys, public squares and commons " ' within the city, and shall cause the same to be kept " ' open and free from nuisance ' (see Mansf. Dig., 737). " The only legal effect of the lease it would seem is to " render the city liable for the damages resulting from " such a licensed nuisance (Cleveland vs. King, 132 U. " S., 295). It makes no difference that owing to the " declivity at the foot of Main street the street at " that point was not commonly frequented by vehicles. " The requirements of the public as to property set " aside for its perpetual use was not a matter to " be passed upon by the council, and it is plain " that by the establishment of a ferry or the building of " a bridge at that point it might at any time become " one of the most frequented of all of the thoroughfares " of the city, the expansion and amelioration of which " cannot be hindered by leases of the streets by the " City Council. The law is well settled, as it ought to " be, that all such leases are void (2 Dillon on Mun. " Corp., Sec. 660 ; McDonald vs. The Mayor [N. J.], 7 " Atl. Rep., 855 ; Harrisburg's Appeal [Pa.], 10 Atl. " Rep., 787 ; Gas Co. vs. Teel, 28 Ind., 131)."

Angell, in his work on Highways, 3d Ed., p. 93, speaking of the occupation of streets by telegraph poles, says :

" The same questions arise as to the establishment " of telegraph and telephone lines upon the highways " and with the same results as to uniformity of de- " cisions. So far as the traveling public are concerned " there seems to be no difference of opinion. The " Legislature in its control over the public easement " may legalize what would otherwise be a nuisance, " and the traveling public use the highway subject to " the conditions imposed by the Legislature. And ac-

" cordingly it is held that telegraph poles erected with-
" in the limits of the highway by proper authority do
" not constitute a defect, and towns are not liable for
" injuries caused by collision with them."

Dillon, in his work on Municipal Corporations, 4th Ed., Sec. 698, says :

" Legislative sanction directly or immediately con-
" ferred for the proper municipal action is necessary to
" authorize the use of streets for the posts and wires of
" a telegraph or telephone company. If such posts be
" erected within the limits of a street or highway *with-*
" *out such sanction they are nuisances ;* but if the erec-
" tion be thus authorized they are not. *Whatever*
" *power the municipality has on this subject must be*
" *granted to it by the Legislature.*"

Tel. Co. vs. Newark, 49 N. J. L., 344.
97 Mass., 555 ; 9 Gray, 386.

The language just quoted was adopted and approved by Chief-Justice BERMUDEZ in Irvin vs. Tel. Co., 31 La. Ann., 64.

" Public streets, squares and commons, unless there
" be some special restriction when the same are dedi-
" cated or acquired, are for the public use, and the use
" is none the less for the public at large as distinct
" from the municipality, because they are situate
" within the limits of the latter, and because
" the Legislature may have given the super-
" vision, control and regulation of them to the
" local authorities. The Legislature of the State represents
" the public at large, and has, in the absence of special
" constitutional restraint and subject (according to the
" weight of more recent judicial opinion) to the property
" rights and easements of the abutting owner, full and
" paramount authority over all public ways and
" public places. ' To the commonwealth, ' says
" Chief Justice GIBSON,' as the King in Eng-
" land, belongs the franchise of every highway as
" a trustee for the public, and streets regulated and re-
" paired by the authority of a municipal corporation
" are as much highways as are rivers, railroads, canals

" or public roads laid out by authority of the Quarter " Sessions.' "

Dillon on Mun. Corp., 4th Ed., Sec. 656.

" By virtue of its authority over public ways the " Legislature may authorize acts to be done in and " upon them, or legalize obstructions therein which " would otherwise be deemed nuisances. As familiar " instances of this may be mentioned the authority of " a railway, water, telegraph and gas company to use " or occupy streets and highways for their respective " purposes. * * * As respects the public or mu- " nicipalities there is, in the absence of special consti- " tutional restrictions, no limit upon the power of the " Legislature as to the uses to which streets may be " devoted."

Dillon on Mun. Corp., 4th. Ed. Sec. 657.

" As the highways of a State, including streets in the " cities, are under the paramount and primary control " of the Legislature, it follows that the authority of " municipalities over streets, and the uses to which " they may be put, depend entirely upon their charters " or the legislative enactments applicable to them."

Dillon on Mun. Corp., 4th Ed., Sec. 680.

The foregoing section was quoted with approval by Mr. Justice HUNT in Barnes vs. The District of Columbia, 91 U. S., 540.

" Whether the fee of the street be in the municipality " in trust for the public use or in the adjoining pro- " prietor, it is in either case of the essence of the street " that it is public, and hence as we have already shown, " under the paramount control of the Legislature as the " representative of the public. Streets do not belong " to the city or town within which they are situated, " even although acquired by exercise of the right " of eminent domain, and the damages paid out of " the corporation treasury. The authority of muni- " cipalities over the streets they derive as they derive " all other powers, from the Legislature—from charter " or statute. The fundamental idea of the street is not " only that it is public, but public for all purposes, and

"free and unrestricted passage, which is itself the chief "and primary object, but by no means the sole use."

Dillon on Mun. Corp., 4th Ed., Sec. 683.
Quincy vs. Jones, 76 Ill., 231-244.
Henkel vs. Detroit, 49 Mich., 249.

"The right *to regulate* markets established by a city "under its charter is one of municipal police."

Dillon on Mun. Corp., 4th Ed., Sec. 389.
Municipality vs. Cutting, 4 La. Ann., 335.

"The meaning of the word '*regulate*,' as ordinarily "used, is 'subject to rules or restrictions.'—Webster's "Dictionary. Or, as Worcester defines it, 'to adjust "'by rules or method; to direct; to put in good "'order; to dispose; to rule; to govern.'"

Duckwall vs. City New Albany, 25 Ind., 284.

Conclusion.

As expressly declared by the "Scheme and Charter," the City of St. Louis acquired no greater interest in the streets of the city when the separation of city and county took place than had theretofore been vested in the county, nor is there upon the statute books of the State any act which gives the City of St. Louis greater control or power over its streets, except as specifically provided, than is possessed by the other cities of the State. It has always been considered necessary in Missouri that express authority must be given to enable a city to impose restrictions upon its streets, which it holds simply as a trustee for the public, and not in fee, as it does its City Hall, parks and other places and buildings used alone for municipal purposes. And so we have accordingly the special grant in the charter of the right to

exact compensation from street railways that occupy the streets, etc. The only implied power as we have shown, which arises out of the express power to regulate, is to exact from the corporation regulated the necessary expense to the city of such regulation.

We have also shown that telegraph companies by direct grant from the Legislature are given the absolute right to set their poles in the streets, free of any condition and restriction whatsoever, excepting those specially reserved in the act to the municipalities to direct where they shall be placed, etc. It would not, for a moment, be contended that a telegraph company, organized, as provided by the Missouri laws, could be required to pay rental to the City before placing its poles under the right squarely given it by the supreme power. The Courts of the State, as shown in the case of State *ex rel.* vs. Flad, 23 Mo. App., 185, have held that no conditions can be imposed upon such a company other than those provided by the statutes and ordinances passed in pursuance thereof. The limitation with respect to such ordinances being as provided in the statute, with respect to the place, posts, etc., shall be located, the kind of posts, and height of the wires. This necessarily excludes the power to exact a rental. And when these conditions have been complied with, mandamus will lie to compel the issuance of a permit for the erection of poles.

It was, therefore, plainly the intention of the Legislature to give to public telegraph and telephone companies the right to use the streets, irrespective of municipal consent, excepting in the specially defined matters of police regulation. And such must certainly be true with respect to grants by Congress, which grants, under the uniform decisions of

this Court, including that in this case, are superior to those even in the Legislature.

Again, the Legislature (as shown in our briefs on the argument, and as this Court evidently holds) has wholly removed from municipal control, in the way of taxation, all telegraph and telephone companies, and has vested in the State Board of Equalization the sole right to impose all taxes upon property and *franchises* of every telegraph company in the State for State, county and *municipal* purposes. The courts have carefully guarded rights which have vested in corporations with respect to the streets, and the cases of State *ex rel.* vs. Corrigan Street Rwy. Co., 85 Mo., 263, the Springfield Rwy. Co. vs. Springfield, 85 Mo., 674, and other cases referred to in our original brief, filed at the argument will show that when rights in the streets vest in pursuance of legislative grants, even though through the instrumentality of municipal action, such rights cannot be subsequently impaired or interfered with, excepting to the extent of reasonable police regulations.

Unsoundness of City's Contention.

It is admitted, or must be, that the telegraph company has the *right*, both under the statutes of the State and the Act of Congress, to use the streets of the city, subject to appropriate, specified and limited municipal regulation. If the city has the implied power to exact a rental for the use of streets for public purposes, what prevents the city, if it is a mere property right, from fixing the rental at such sum as to defeat and destroy the right given by the Legislature and by Congress. Municipal regulation, legislative in its character, must be reasonable, and reasonableness is a question for the

courts; but, if the city fixes a hundred dollars per month as rental for the use of a room in its city hall, this is a proprietary right, and who can gainsay it? But if the city, treating itself as a proprietor of its streets, should as such proprietor say to the telegraph company: "We demand a hundred dollars a year per "pole for the use of our property, and you can use it or "not use it, as you please," if the city be such proprietor, who can gainsay its power to do this very thing? If the city has an implied right to fix a "rental," in any proper sense of that word at all, where is the authority of any Court to fix any limit to that right? To state this proposition shows that the power claimed by the city here is one inconsistent with and destructive of rights conferred directly upon the telegraph company by the Legislature of the State and by the Act of Congress. There is a distinction between the right of the city in its property, such as a city hall or even wharf, and the right of a city in and over its streets, which latter right is simply what the Legislature may see fit to confer upon it. Here the paramount right directly given by the Legislature to the company is the right to use the streets, such power over the use, so far as the State is concerned, being plenary.

There are two rights which are brought into competition. The Legislature of Missouri has said to the telegraph company: You may occupy the streets with your poles subject to the city's police power to regulate the right thus granted in certain limited and specified ways, which do not include (and therefore exclude) the right to make any pecuniary exaction. It makes no difference whether you call it a tax, which it is conceded the city cannot levy, or a license to use the streets, which it is conceded the city cannot impose, or

whether you call it a rental. "Rental" is worse than "tax," for taxation must be equal; but what limits are there to rental? To recognize the implied power under these circumstances in the city to exact a rental is inconsistent in its very nature with the legislative supremacy of the State over streets and highways. The two cannot consist. Rental implies proprietorship. It implies dominion on the part of the proprietor, and therefore the power, like any other proprietor, to fix the terms on which anybody may occupy his property. If he does not like the terms he may refuse to accept them. The difficulty with the novel contention here presented by the city is that it assumes a proprietorship in the city which does not exist, and whose existence is inconsistent with the legislative supremacy over the streets. The streets are for public uses. The Legislature, so far as the municipality is concerned, has supreme power to determine what are public uses. The Legislature of Missouri has declared the use by a telegraph company to be a public use. The Supreme Court of Missouri has decided that it is a proper street use, and, therefore, even the abutter has no remedy against the company for such use.

But suppose, as is held in many of the States, the property to the centre of the street is in the abutter, and he sues the telegraph company and makes it pay for the right of way, or it voluntarily adjusts the matter with him. In this case the telegraph company would have the right directly conferred upon it by the Legislature and by the Act of Congress to occupy the streets, and it would have acquired the right from the abutter. What right of proprietorship would remain in the City of St. Louis to exact rental? To state this is

to expose the utter unsoundness of the city's contention.

Therefore, it is plain to a demonstration that to recognize in the city an implied right to say to the company, "Thus having direct legislative authority, you shall not exercise it unless you pay some pecuniary exaction," is inconsistent with and utterly destructive of the legislative supremacy over the streets; just as much so as to recognize, under such circumstances, an implied power to tax.

This case seems to us, under the legislation of Missouri, exceedingly simple. It is not even necessary to invoke the familiar doctrine against the city that, if there be any reasonable doubt or ambiguity concerning the existence of the power asserted by it, it is to be resolved, by the courts, against the corporation and the power denied. This is decided by the Supreme Court of Missouri in a case just out (Campbell vs. Carroll, 108 Mo.). We say it is not necessary to invoke this doctrine, since, in this case, the legislative intent that the company should have this right, subject only to specified regulations, which do not include the power to exact a rental, is clear. *Expressio unius est exclusio alterius.*

This Court has repeatedly and uniformly applied the principle which we here seek to maintain. For example, the Government of the United States is supreme in its sphere. The States have no power, by taxation or otherwise, "to retard, impede, burden, or in any manner control" the exercise of the functions of the Government of the United States. Thus, in the famous case of McCulloch vs. Maryland, 4 Wheat, 316, the question arose whether

the State of Maryland could tax the United States Bank, an agency of the Federal government, and this Court unanimously decided that the State of Maryland had no power to levy any tax, however, minute, upon the bank. Chief-Justice marshall, giving the opinion of the Court, said (page 436):

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government." * * *

"The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

It is unnecessary to say to this Court that this decision has been uniformly followed from that day to this, and has been applied in a hundred instances. This is a matter of contest for supremacy between the Legislature of the State of Missouri and the City of St. Louis.

The proposition that the city may, in the absence of express legislative authority, exact a rental for the use of the public streets for street purposes, or for a public purpose expressly sanctioned by the Legislature, is, so

far as we know, entirely novel. We know of no case which so holds, and as this point is not argued in the opinion of the Court in this case, we are unable to see how it can be supported. But even if this were so, any such implied power in the City of St. Louis is negatived by the Act of 1851, continued in force till this day, as more fully set forth in the supplemental brief filed herewith.

JOHN F. DILLON,
RUSH TAGGART,
ELENEIOUS SMITH,
For Telegraph Company.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF ST. LOUIS, Plaintiff in Error, vs. THE WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.	No. 94. October Term, 1892.

Supplemental Brief of the Western Union Telegraph Company.

Under the order of this Court of April 17th, 1893, the sole question for discussion in this supplemental brief is whether the City of St. Louis has such proprietary interest in and control over the streets, alleys and public places within its limits as authorizes it to impose upon The Western Union Telegraph Company a charge in the nature of a rental for the exclusive use of portions thereof in the manner described in the ordinance set forth in the record in this case. The discussion of the question upon which the Court has thus given leave to the parties to file briefs would seem to naturally fall under the two heads: (1) whether, as a matter of general law, the city is the representative of the public as to streets, alleys and public places within its limits, so that as owner therof or *quasi* owner, it is entitled to charge a rental for portions of such streets, alleys and public places, lawfully occupied in accordance with general laws of the State, by the poles of the telegraph company; (2) if not, as a

matter of general law, entitled thus to charge rental for such use and occupation, then, whether, under the peculiar legislation of the State of Missouri applcable to the City of St. Louis, the City of St. Louis is invested with such powers as to the streets, alleys and public places within its limits.

The propositions which the defendant in error will undertake to maintain in this supplemental brief are

(1) That as a matter of general law, sustained by the uniform concensus of the authorities, so far as counsel for defendant in error have been able to ascertain the same in Missouri and elsewhere, the State is the representative of the public in respect of the ownership of streets, alleys and public places, as well inside as outside the limits of cities, and that cities are divsions of the State, receiving their powers from the State, and have only such powers with respect to streets, alleys and public places, and the control of the same as the State, acting through the Legislature thereof, has seen fit to grant ;

(2) That under the Constitution of Missouri, and legislation enacted in pursuance thereof, there is not only no attempt made to confer such jurisdiction and power upon the City of St. Louis as claimed by said city, but that, on the contrary, there is clear, indisputable evidence in the legislation of an intention on the part of the State to withhold from the city the power thus to exact from telegraph or telephone companies any compensation in the nature of a rental such as the city claims the right to exact under the ordinances in question in this case.

I.

An examination of the authorities leaves no question as to the proposition that municipal corporations or cities, as such, have no control over, and are not the representatives of the public in the ownership and control of streets, alleys and public places within their limits. Their powers in and over streets and their uses are wholly statutory and not inherent. Cooley, in his work upon Constitutional Limitations, thus treats of the powers of public corporations:

"The powers of these corporations are either express or implied; the former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant. Certain powers are also incidental to corporations, and will be possessed unless expressly or by implication prohibited. Of these an English writer has said: 'A municipal corporation 'has at common law few powers beyond those of elect- 'ing, governing and removing its members, and 'regulating its franchises and property. The power of "'its governing officers can only extend to the adminis- "'tration of the by-laws and other ordinances by which "'the body is regulated'; but, without being expressly "empowered so to do, they may sue and be sued, may "have a common seal, may make by-laws whenever "necessary to accomplish the design of the incorpora- "tion and enforce the same by penalties, and may "enter into contracts to effectuate the corporate pur- "poses. Except as to these incidental powers, and "which need not be, though they usually are men- "tioned in the charter, the charter itself, or the general "law under which they exist, is the measure of the "authority to be exercised. And the general disposi- "tion of the courts in this country has been to confine "municipalities within the limits that a strict construc- "tion of the grants of powers in their charters will "assign to them; thus applying, substantially, the "same rule that is applied to charters of private

" incorporation. *The reasonable presumption is that* " *the State has granted in clear and unmistakable terms* " *all it has designed to grant at all.*"

Also the same author, at page 235, under the head of " Legislative control of corporate property," says :

" The legislative power of the State controls and disposes of the property of the State. How far it may also control and dispose of the property of those agencies of government which it has created and endowed with corporate powers, is a question which happily there has been very little occasion to discuss in the courts. Being created as an agency of government, it is evident that the municipality cannot in itself have that complete and absolute control and power of disposition of its property which is possessed by natural persons and private corporations in respect to their several possessions. For it can hold and own property only for corporate purposes, and its powers are liable at any time to be so modified by legislation as to render the property no longer available. Moreover, the charter rights may be altogether taken away ; and in that case the legislature has deprived the corporation of its property by depriving it of corporate capacity to hold it. And in many ways, while the corporation holds and enjoys property, the Legislature must possess power to interfere with its control, at least incidentally ; for the mere fact that the corporation possesses property cannot deprive the State of its complete authority to mould and change the corporate organization, and enlarge or diminish the powers which it possessed before."

Dillon on Municipal Corporations, 4th edition, Volume 2, Sections 656 and 657, thus defines the relation between the municipal corporation and the Legislature of the State with respect to control of streets :

SEC. 656 (518). *Public Nature of Streets and Extent of Legislative Control.* Public streets, squares and commons, unless their be some special restriction, when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situated within the limits of the latter, and because

the legislature may have given the supervision, control and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint and subject (according to the weight of more recent judicial opinion) to the property, rights and easements of the abutting owner, full and paramount authority over all public ways and public places. "To " the Commonwealth here," says Chief-Justice GIBSON, " as to the King in England, belongs the franchise of " every highway as a trustee for the public; and streets " regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, " railroads, canals, or public roads laid out by " authority of the quarter sessions." [This case expressly adopted in Missouri; see principal brief, herewith filed.]

The Legislature has power to determine where and when streets shall be constructed, their width and mode of improvement, and its action in these respects cannot be reviewed by the Courts. It may adopt and sanction an improvement or expenditure which it could previously have authorized, and it may authorize an assessment for an improvement after the improvement is made" (see cases cited by author in notes).

* * * * * *

" Sec. 657 (519). Legislative Power Over Streets. By virtue of its authority over public ways the Legislature may authorize acts to be done in and upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed, that whatever the Legislature may constitutionally authorize to be done is, of course, lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances; if they were such without, they cease to be nuisances when having the sanction of a valid statute.

" As respects the public or municipalities there is, in the absence of special constitutional restriction, no limit upon the power of the Legislature as to the uses to which streets may be devoted.

" What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others is a subject which is elsewhere considered in this chapter. Statutes authorizing or legitimating acts and obstructions upon the highways which would otherwise be nuisances are strictly construed and must be closely pursued, and the authority given must be exercised with proper care."

This question would likewise seem to be set at rest by the opinion of the Court in this case of Meriwether vs. Garrett, 102 U. S., 472. The first point of the syllabus (which is accurate) presents the exact principle contended for by the defendant in error:

" (1) Property held by the City of Memphis for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments, and, generally, all things held for governmental purposes, cannot be subjected to the payment of its debts; *upon the repeal of the charter such property passes under the immediate control of the State, the powers once delegated to the city in that behalf having been withdrawn.*"

At page 511, Mr. Justice FIELD, speaking for himself, Mr. Justice MILLER and Justice BRADLEY, thus defines the relation of municipal corporations to the State:

" Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning found in all adjudications on the subject of municipal bodies, and repeated by text writers. There is no contract between the State and the public that the charter of the city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them

(*United States vs. Railroad Co.*, 17 Wall., 322; *Commissioners vs. Lucas*, 93 U. S., 108; *People vs. Morris*, 13 Wend. [N. Y.], 325; *Philadelphia vs. Fox*, 64 Pa. St., 169; *Montpelier vs. East Montpelier*, 29 Vt., 12; Angell & Ames, Corp. [10th Ed.], Sect. 31; Dill. Mun. Corp., Sect. 30; Cooley, Const. Lim., 192, 193). By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the State."

Again, at page 513:

"What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, court-houses and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing."

See also to the same effect, *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 661.

New Orleans Water Works Co. vs. Rivers, 115 U. S., 674.

Also, *Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683.

In the second of the cases cited from the 115th U. S., the facts are very close to the case at bar under the legislation of Missouri, as claimed by the defendant in

error. In this case the State had given to the New Orleans Water Works Co. the exclusive right for the full term of fifty years, from March 31st, 1877, of supplying the City of New Orleans and its inhabitants with water from the Missouri River by means of pipes and conduits placed in the streets of the city. The defendant Robert C. Rivers, based his right to proceed with the construction of pipes, mains and conduits upon an ordinance of the Common Council of the City of New Orleans, adopted on the 15th of November, 1882, and enacted, as contended by him, in pursuance of authority conferred by the Constitution and laws of Louisiana. The complainant claimed that the legislation under which it constructed its wate-rworks amounted to a contract with the State, giving to it the exclusive right to the use of the streets, by virtue of which contract no other person could acquire, during the term for which that contract ran, any rights from the city in and to the streets. Justice MILLER, passing upon this claim, says, at page 680:

"The New Orleans Water Works Co. was in existence before the adoption of the present constitution of Louisiana, one of the articles of which, as we have seen, repeals the monopoly features in the charters of all her then existing corporations other than railroad companies. This case is therefore controlled by the decision just rendered in *New Orleans Gas Co. vs. Louisiana Light Co.*, ante 650. The two are not to be distinguished upon principle, for if it was competent for the State, before the adoption of her present constitution, as we have held it was, to provide for supplying the City of New Orleans and its people with illuminating gas by means of pipes, mains and conduits placed at the cost of a private corporation in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city.

"The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water, is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms as she deemed best for the public interests.

"And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property."

We do not know any cases or authorities which question the doctrine contended for here, that municipalities depend for all of their powers, including those relating to streets and public places, upon legislative grants conferring them. One of the latest writers upon this subject thus states the doctrine as undisputed:

"(3) *The Power Over Streets Belongs To The Legislature.*

"It is well settled that the use of the streets belongs to the public at large, as distinguished from the municipality, that the Legislature represents the public, and that the municipality has no control over the streets, except what is given to it by the Legislature, either expressly or by implication.

"The Legislature has (in the absence of constitutional restraint and subject to the property rights and easements of the abutting owner) full and paramount authority over all public ways and public places. From this it follows that the authority of municipalities over the streets and the uses to which they may be put, depend entirely upon their charters or the legislative enactments applicable to them. 'The public easement in 'the highways,' says Mr. Justice MAGIE, of New Jersey, 'is vested in the public and can be divested by 'nothing short of an exercise of soverign power. The 'Legislature representing the public may release the 'public right by vacating the highway, may modify

'the public use by granting a right to use the highway 'for a horse-railroad, or may restrict the public use by 'granting a right to erect poles or other obstructions 'in the highway. What the Legislature may thus do, 'it may delegate authority to do. * * * No reason 'appears why all such authority possessed by the 'legislature may not thus be delegated. But the 'delegation of such powers must plainly appear either 'by express grant or by necessary implication. '(*Domestic Telegraph and Telephone Co. vs. Newark*, '49 N. J. L., 344, 346.)'

"(4) *The Power of the Municipality is Only What Is Delegated.*—The extent, therefore, of the power of the municipality depends upon the breadth of the charter or statutes authorizing municipal action. The Legislature may, no doubt, delegate to the municipal government absolute control over the streets, with express power to dispose of the public rights therein for public purposes, and the question whether in any particular case the local authorities have power to grant a franchise, must be decided by reference to the local statutes."

Keasbey on Electric Wires, pp. 7, 8.

The rule as to telegraph poles in streets and highways is very clearly stated in Dillon on Municipal Corporations, Vol. 2 (4th ed.), Sec. 698, as follows :

"Legislative sanction directly given or mediately conferred through proper municipal action is necessary to authorize the use of streets for the posts and wires of a telegraph or telephone company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances, but if the erection be thus authorized, they are not. Whatever power the municipality has on this subject, must be granted to it by the Legislature." Citing cases.

The counsel for the City of St. Louis, in the original brief filed in this case, at pages 38, 41 and 48, make the claim that the amount charged by this ordinance is a toll, a demand of proprietorship by the owner of the domain, a return for a beneficial use and

for facilities furnished by the plaintiff in error to the telegraph company.

It is not stated whether this claim is based upon the principle that, as a matter of general law, the City of St. Louis, having control of the streets for the purposes of regulation and on behalf of the public is *ipso facto* vested with all the rights of proprietorship as the result thereof, or whether this conclusion is deduced from the peculiar state of the legislation in relation to the City of St. Louis.

The brief quotes neither authorities in support of the proposition as a general proposition of law, nor statutes nor constitutional provisions, as matter of special legislation or authorization.

The position of counsel for the city in this respect is directly opposed to the adjudications of the Supreme Court of the State of Missouri. The case of A. & P. R. R. Co. vs. St. Louis, 66 Mo., page 256, is in conflict with the position of the city, and affirms the proposition, both as a general proposition of law and, also, under the special legislation relating to the City of St. Louis, that the Legislature is the representative of the public in the control of the streets and highways within the limits of the City of St. Louis. This was a proceeding on behalf of the railroad company for an injunction against the city to restrain it from interfering with the railroad company's track laid on Poplar street in that city. The right to lay the track was granted to the company's lessor by its charter. The Court, through HENRY, J., say:

"The assent of the city was not necessary to per-"fect the right which the company acquired by the "act of the General Assembly to lay this track along "the street. The State has ABSOLUTE CONTROL

"OF THE STREETS IN CITIES AND OTHER "PUBLIC HIGHWAYS, AND THE CITY HAS "NO AUTHORITY, unless it be conferred by the "Legislature, to authorize the use of any street "within its limits for the construction and operation "of a railroad to be traversed by a locomotive "worked by steam (Dillon Mun. Corp., Secs. 575, 578, 579).

And said the Court of Appeals in this case: "Streets, "in incorporated cities and other public highways, are "subject to the paramount authority of the Legislature "in the regulation of their use. Did the acceptance of "the privilege from the city to lay the track estop the "company from claiming the right to lay it under the "Act of the General Assembly? The ordinance was a "nullity. The city undertook to grant a franchise "which it had no authority whatever to dispose of. "Upon its face, the ordinance was null and void. The "company received nothing from the city as a consid- "eration for relinquishing or waiving the privilege "granted by the General Assembly. The theory upon "which railroad companies have been incorporated, "with power to condemn private property for rights of "way, is that they are public, not private, enterprises— "that the public has an interest in their construction "and operation, and that the public welfare demands "them.

"Some courts have even gone so far as to hold that "they can be compelled by *mandamus* to build them. "The rights of the city in its streets, and the control "which the Legislature has over them, are matters of "which the Courts will take judicial notice.

"The city ordinance conferred no right and could "impose no obligation upon the company inconsist- "ent with or impairing the franchise granted by the "State."

See also other Missouri decisions to same effect: State *ex rel.* vs. Flad, 23 Mo. App., 186; Hannibal vs. M. & K. Tel. Co., 31 Mo. App., 23; City of St. Louis vs. Bell Tel. Co., 96 M., 623; Julia Building Association vs. Bell Tel. Co., 88 Mo., 258.

State *et al.* vs. Mayor of Newark, 8 Atlantic Rep., 128.

We venture the assertion therefore, that no authority can be found in support of the doctrine that the city, as such, is entitled to charge a rental for the use of the streets, alleys and public places independently of the special powers vested in it by legislation of the State from which it derived its existence.

II.

This brings us, therefore, to a consideration of the second head of the discussion of this question whether, under the special legislation relating to the City of St. Louis, and the statutes and laws of Missouri, the City of St. Louis has a right as proprietor to charge this defendant rental for the use of its streets, alleys and and public places. This will involve for its proper consideration a reference to the history of the legislation of Missouri, relating to telegraph companies. The record in this case tends to show that, as early as 1848, some of the telegraph lines involved in this controversy were located within the City of St. Louis (Record, p. 36). Historically we know that the telegraph (a recent invention), had at about that period reached as far West as the State of Missouri. It is in evidence also and undisputed that, prior to and in 1865, the Western Union Telegraph Company had a large plant within the City of St. Louis and has maintained the same ever since that date (Record, p. 36). The earliest legislation which we have been able to discover relating to telegraph lines in the State of Missouri, is the Act of February 22, 1851. It is important to

notice this as the State was now for the first time dealing with the new situation presented by the introduction of the telegraph. The said act of February 22, 1851, is entitled "An Act concerning electric telegraph "companies and electric telegraphing." The provisions of the said act, so far as they are material to the question we are now considering, are as follows:

"SEC. 1. Every company for the transmission of intelligence by electricity, which now is or may be incorporated, and every owner or association which may be engaged in telegraphing for the public by electricity in this State, shall be subject to the liabilities and governed by the provisions contained in this act.

Sec. 2. Any company incorporated for the purpose may construct lines [of] electric telegraphs upon and along any of the highways and public roads, and across any of the waters, within the limits of this Staet, by the erection of necessary fixtures, including posts, piers or abutments, for sustaining the wires of such lines; provided, the same shall be so constructed as not to incommode the public use of said highways or roads, or endanger or interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this State. [Note. By this section the *right* given directly by the Legislature to the telegraph company, and the terms of the grant exclude the power of a municipal or public corporation to impose a rental, since such a power is not granted and is inconsistent with the granted power, and might be used to destroy it. Any doubt on this subject is removed by Section 3 of the Act which specifies and by such specification limits what the city may do].

"SEC. 3. The Mayor and Aldermen of any city, and the trustees of any incorporated town, through which the lines of such company are to pass, **either by ordinance or by writing, may specify where the posts may be located, the kind of posts that may be used, the height at which, and the places where, the wires may be run, and such company, in erecting their line, shall be governed by the regula-**

tions therein prescribed. After the erection of said telegraph lines, the said Mayor and Aldermen, and trustees, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also the height at which the wires shall run, having first given such company, or their agents, opportunity to be heard on such alteration.

* * * * * *

"Approved February 22, 1851."

It is not without relevancy upon this matter that, immediately subsequent to the enactment of this law, we find, on succeeding pages of the laws of Missouri, three acts to incorporate telegraph companies—the first an act to incorporate the St. Louis and New Orleans Telegraph Company; the second, an act to incorporate the St. Louis and Missouri River Telegraph Company; and the third, an act to incorporate the Santa Fé, New Mexico and Missouri Telegraph Company. It will be noticed also that, in that early day, every inducement which the State could legitimately offer to secure the advantages of this speedy transmission of intelligence was given, and the privileges of the act are not confined to a company incorporated in Missouri, but the rights and privileges run to any company incorporated for the purpose of transmitting intelligence by electricity, or which may be engaged in telegraphing for the public.

Revision, 1855.

The revision of the laws of the State of Missouri in 1855, page 1520, simply incorporated into the revision the Act of February 22, 1851, changing the numbers of the sections in some particulars. The language of section two of the Act of 1851 above

quoted is unchanged; likewise of section three of the act, relating to the powers of cities over the telegraph lines authorized to be constructed.

Revision, 1865.

By the Revision of 1865 a slight change is made in the language of what was section two of the Act of 1851, the provision being made to read:

"Companies organized under the provisions of this chapter for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters."

There is, however, no hint of a withdrawal or restriction of the privileges granted to companies which had gone forward and constructed lines under the conditions named in the Acts of February 22d, 1851, or in the Revision of 1855. By Section 14 of Chapter 65 of the Revision of 1865, we think on the contrary there is an express recognition of the rights of such telegraph companies which had constructed telegraph lines under the previous acts of 1851 and 1855. Section 14 provides as follows:

"SEC. 14. The Mayor and Aldermen, or Board of Common Council of any city, and the trustees of any incorporated town through which the lines of *any telegraph company are to pass* may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and, after the erection of said telegraph lines, the said Mayor and Aldermen, or Board of Common Council, and the trustees of any incorporated town shall have power to direct any alteration in the location or

erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company, or its agents, opportunity to be heard in regard to such alteration."

Revision, 1879.

In the revision of 1879 the legislation is permitted to remain as in 1865, save and except that, in Section 879, the telephone is added as one of the purposes (Laws of Missouri, Revision of 1879, Section 879, p. 158).

The extent of the right of interference by the city authorities, under revision of 1879, is likewise as strictly limited by Section 14 of the Act of 1875 above quoted. The rights of the city authorities respecting telegraph companies is thus defined in Section 888:

Sec. 888. *Mode of construction may be directed by whom?* The mayor and aldermen, or Board of Common Council of any city, and the trustees of any incorporated town through which the lines of any telephone or telegraph company are to pass, may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run, and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said Mayor and Aldermen, or Board of Common Council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration (G. S., 353, Sec. 14, amended).

Thus stood the legislation so far as the State was concerned at the time of the enactment by the City of St. Louis of the ordinances in question.

Scheme and Charter.

We now come to examine the provisions of the Scheme and Charter of the City of St. Louis, and of the Constitution of the State, to see whether any provisions are therein contained which limit or qualify or affect the natural and reasonable construction of the legislation enacted in pursuance of a policy limiting the right of the authorities of a city to interfere with the construction of a telegraph line on the streets, alleys or public places, to three particulars, viz., height and location of poles, and height of wires, which has been uninterruptedly pursued by the State since 1851. An examination of the Constitution of the State of Missouri, adopted October 30, 1875, and which went into operation on the 30th of November, 1875, and which therefore was in force at the time the scheme and charter of the City of St. Louis were adopted, discloses nothing bearing upon this subject except in Article 9, Sections 20 to 25 inclusive, concerning the formation of the scheme and charter of the City of St. Louis.

By Section 23 it is provided that:

"Such charter and amendments authorized to be "adopted by the City of St. Louis under the conditions "named in the preceding sections, shall always be in "harmony with and subject to the Constitution and "laws of Missouri."

Also Section 25 provides:

"Notwithstanding the provisions of this article, the "General Assembly shall have the same power over "the City and County of St. Louis as over other cities "and counties of this State."

Revision of 1879, Volume 1, page LXXIX.

Under the authority of these provisions of the Constitution, the authorities of the City of St. Louis duly prepared the "scheme and charter," which went into effect in the year 1876. By Section 10 of this scheme and charter, we find the relations of the City of St. Louis to the former County of St. Louis, and with respect to the streets and public buildings and property within its limits, defined as follows:

"Section 10. *Public Buildings Transferred. Assumption of Debt*, etc. All public buildings, institutions, public parks and property of every character and description heretofore owned and controlled by the County of St. Louis, within the limits as extended, including the court-house, the county jail, the insane asylum, and the poor-house, are hereby transferred and made over to the City of St. Louis, and all the right, title and interest of the County of St. Louis in said property, and in all the public roads and highways within the enlarged limits, is hereby vested in the City of St. Louis and divested out of the county, and in consideration of the city taking the proprietorship of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax; and the Municipal Assembly shall, as soon as practicable after the adoption of this scheme and charter, provide by ordinance for the management of the property and public institutions hereby placed under its charge" (Revised Stats. of Missouri, 1879, Vol. 2, p. 1565).

By Section 26, Article 3, the powers of the Mayor and Assembly of the City of St. Louis are thus defined:

"Sec. 26. *Powers of Mayor and Assembly.* The Mayor and Assembly shall have power within the city, by ordinance, not inconsistent with the Constitution or any law of this State, or of this charter:

"FIRST. To assess, levy and collect all taxes for general and special purposes, on real and personal property and licenses; to borrow money on the faith and credit of the city, by the issue or sale of bonds or notes, for such amounts, and for such time, and for

such purpose as may be required for current expenses, and for payment of maturing bonds; but no note for the purpose of borrowing money shall be made or issued for any longer period than twelve months; to appropriate the money of the city for legitimate purposes and provide for its debts and expenses.

"SECOND. To establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for grading, lighting, cleaning and repairing the same, and to condemn private property for public uses, as provided for in this charter, to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof, and to confine, wall up, cover over, alter or change the channel of water courses, to establish and maintain water-works for fully supplying the city with wholesome water, and to distribute the same for public and private uses in such manner and upon such terms as it shall be provided by ordinance; to establish and maintain a sanitary system, a system of police and a fire department, provided that no system of police shall be established or maintained other than the present metropolitan system, as long as the same is established by law."

* * * * * *

"FIFTH. To license, tax and regulate lawyers, doctors,"

* * * * * *

"telegraph companies or corporations;" * * * to license, tax, regulate or suppress all occupations, professions and trades not heretofore enumerated, of whatever name and character" (Vol. 2, Rev. Sts., 1879, p. 1585).

So far as we are able to discover, these are all of the provisions of the statutes of the State or provisions of the scheme and charter which have any bearing upon the question we are considering. Under the principles of construction given by the authorities quoted under the first head under which the question is considered, that municipalities have such powers and such powers only as are conferred

by the Legislature and such rights and such control over the streets, alleys and public places as are named in the legislation relating to such cities, it would seem to be unnecessary to prolong the discussion by suggesting that the entire absence of any such authority to the city to enact the ordinance under which the charge of $5 per pole is sought to be collected of the defendant in error, in this case, would be sufficient to establish its entire invalidity. Not only does this legislation establish an entire absence of any foundation for the claim that the City of St. Louis has been invested with the full proprietary right as the representative of the Legislature, enabling it, as such representative, to fix the terms upon which the telegraph company could be entitled to represent the public interest in the streets, but it shows exactly the contrary of this position; it shows that the Legislature, the representative of the public in that regard, has fully conferred upon the telegraph company the right in question freed from any interference or control by the city, except in the three particulars named—height and location of poles, and height at which the wires must be maintained.

Concluding Explanatory Statement.

The order of the Court herein on our application for a rehearing was made on the 17th of April, and was not received by us until the next day. The local counsel, naturally more familiar than the counsel at New York with the legislation and decisions of Missouri, were a thousand miles distant, and we had no opportunity for conference and the preparation of a single brief. This accounts for our troubling the Court

with a supplement to the brief, since the time available for preparation did not allow the counsel to fuse what we had to say in a single brief. There is, however, very little repetition. The counsel on each side labor under the additional disadvantage of not having seen their opponents' brief, and so are striking more or less in the dark.

It is respectfully suggested that a principle of so great importance as the one announced by the Court in its opinion—one which we believe to be wholly new, one which has already been attended with such great consequences, and whose effect, not only upon the telegraph company, but upon other great interests (public and private interests), no one is wise enough to foresee—ought not to be established upon a consideration of what at the most are *ex parte* briefs. Is it not fitting that such a great question be debated at the bar? Such a course alone consists with that which regulates the invariable practice of this great tribunal, and which not only endears it to the bar, but roots it in their confidence and regard.

Indeed, what a poor and mischievous substitute is printers' ink for face-to-face argument where the object is to elicit the very truth of the matter, both of fact and of law. There are strong *prima facie* grounds to distrust the soundness of the decision of any Court in causes novel or complex, which have been submitted wholly upon briefs. In the earlier days of the law the Courts were not burdened with arrears or pressed for time, and then when new or difficult questions arose, Judges, on their own motion, invited argument and frequently reargument *always in open Court*. On the subject of the value of oral arguments we have often been struck with the impressive language of Lord COKE. We

trust we may be pardoned for repeating it, for we verily believe it. Your Honors' large judicial experience will enable you to appreciate the truth so solemnly expressed.

"In cases of difficulty," he says, "no man alone, with all his uttermost labors, nor all the actors in them, themselves by themselves, out of a court of justice, can attain unto a right decision; *nor in court without solemn argument, where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right.*"

JOHN F. DILLON,
RUSH TAGGART,
ELENEIOUS SMITH,
For Telegraph Company.

(94)

Office Supreme Court U. S.
FILED.
DEC 9 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

No. 13,645.

ABSTRACT OF THE RECORD, STATEMENT, ASSIGNMENT OF ERRORS, ARGUMENT AND BRIEF FOR PLAINTIFF IN ERROR.

W. C. MARSHALL,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF ST. LOUIS, *Plaintiff in Error,* *vs.* THE WESTERN UNION TELEGRAPH COMPANY, *Defendant in Error.*	No. 13,645.

ABSTRACT OF THE RECORD, STATEMENT, ASSIGNMENT OF ERRORS, ARGUMENT AND BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT OF THE RECORD.

The petition in this case, filed in the Circuit Court of the City of St. Louis on the 7th day of April, 1888, was in words and figures following, to-wit:

PETITION.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS.

STATE OF MISSOURI, }
City of St. Louis. } ss.

Returnable to the June Term, 1888.

The City of St. Louis, Plaintiff,
vs.
The Western Union Telegraph Co., Defendant.

Plaintiff states that it is, and has been since 1822, a municipal corporation duly created and existing under the laws of the State of Missouri, and that the defendant is and was at the times hereinafter mentioned, a telegraph company and corporation doing business in the City of St. Louis and using the streets, alleys and public places thereof for its telegraph poles, and said defendant was not at said time or at any time taxed on its gross income for city purposes.

That, by an ordinance of the City of St. Louis, entitled "An ordinance to regulate the erection of telegraph poles," approved February 25, 1881, and being ordinance number 11,604, it was provided as follows:

[11,604.]

An Ordinance to Regulate the Erection of Telegraph and Telephone Poles.

Be it ordained by the Municipal Assembly of the City of St. Louis, as follows:

Section 1. Any telegraph or telephone company duly incorporated according to law, doing business or desiring to do business in the City of St. Louis, is hereby authorized to set its poles, pins, abutments, wires and other fixt-

ures along and across any of the public roads, streets and alleys of the city, subject to the regulations hereinafter provided.

Sec. 2. Whenever, in the judgment of the board of public improvements, the use of any alley for such purpose is practicable, the poles of such companies shall be placed upon and along said alley instead of along the streets next adjoining and parallel thereto. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such manner as not to incommode the public or the adjoining proprietors or residents.

Sec. 3. The poles used as herein provided shall be of sound timber, not less than five inches in diameter at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint of such colors as may be directed by the board of public improvements, and be supplied with iron steps commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires; said wires shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed in all cases, when practicable, on the outer edge of the sidewalk, just inside the curb-stone, and on the line dividing the lots from the other, and in no case to be placed so as to obstruct the drainage of the streets or to interfere with or damage in any way the curb-stones, trees or other public or private property on the line of the street or alley where such poles shall be erected.

Sec. 4. Before any telegraph or telephone company shall erect any poles upon any street or alley they shall submit for approval to the board of public improvements the route of their proposed line or lines, stating the name of the street or streets to be occupied, or, if any alley, the

number of the block, and as far as practicable the location of each pole. All work of excavating, refilling and restoring the pavements shall be done under the supervision and direction of the street commissioner to his entire satisfaction, and in all cases the pavement shall be restored as speedily as possible and to the same condition it was before.

Sec. 5. The right is hereby reserved to the board of public improvements at any time to direct any alteration in the location of said poles, and also in the height at which the wires shall run; but before any such alteration is made, at least five days' notice in writing shall be given to the president or local officer in charge of the company affected by the proposed alteration; and reasonable opportunity shall be afforded the representatives of said company or any citizen interested to be heard therein. But when any such alteration shall be ordered, the said company shall, within five days thereafter, commence such alterations and complete the same as soon as practical thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

Sec. 6. Every telegraph or telephone company doing business in this city shall keep on deposit with the treasurer the sum of fifty dollars, subject to the order of the street commissioner, to be used by him in restoring any sidewalk, gutter, street or alley pavement displaced or injured in the erection, alteration or removal of any pole of such company, when said company refuses or fails to make such restoration to the satisfaction of such commissioner. Any company failing to make such deposit within thirty days after the passage of this ordinance, or within five days after commencing business, if a new company, or which shall fail to make good the amount when any portion of it has been expended as herein provided, within

five days after notice so to do has been sent by the street commissioner, shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

Sec. 7. Any telegraph or telephone company doing business in the City of St. Louis, or any president, manager, superintendent or local officer in charge thereof, who shall violate or fail to comply with any of the provisions of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars.

Sec. 8. Any company erecting poles under the provision of this ordinance shall, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register permitting the City of St. Louis to occupy and use the top cross-arm of any pole erected, or which is now erected, for the use of said city for telegraph purposes, free of charge.

Sec. 9. Nothing contained in this ordinance shall be so construed as to in any manner affect the right of the city in the future to prescribe any other mode of conducting such wires over or under its thoroughfares.

Sec. 10. Every telegraph or telephone company doing business in this city shall, within twenty days after the passage of this ordinance, file with the city register its acceptance in writing of so much of this ordinance as relates to the use by the city of the top cross-arm of the poles.

Approved Feb. 25, 1881.

That subsequently, by an ordinance of the City of St. Louis, entitled "An ordinance to amend ordinance number 11,604, entitled 'An ordinance to regulate the erection of telegraph and telephone poles,' approved March 22, 1884, and being ordinance number 12,733," it was provided as follows:

[12,733.]

An Ordinance to Amend Ordinance Number 11,604, entitled "An Ordinance to Regulate the Erection of Telegraph and Telephone Poles."

Be it ordained by the Municipal Assembly of the City of St. Louis, as follows:

Section 1. Ordinance number 11,604, entitled "An ordinance to regulate the erection of telegraph and telephone poles," is hereby amended by adding thereto the following new sections, viz:

"Sec. 11. From and after the first day of July, 1884, all telegraph and telephone companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of St. Louis, for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city.

Sec. 12. The principal officer located in St. Louis of each and every company aforesaid shall, during the month of July in each year, file with the city collector a statement in writing, under oath, specifying the number of telegraph or telephone poles in use by his company on the first day of July of said year, and said company shall at the same time pay to the city collector for the use of the city said sum of five dollars for each and every pole so shown for the year commencing on the first day of July.

Sec. 13. If the collector shall not be satisfied of the correctness of any statement so made by said officer, he shall have power to require said officer to appear before him with the books and papers of the company and submit to an examination concerning the matters aforesaid, and if it shall be ascertained, to the satisfaction of the collector on said examination, or in any other manner, that said officer has not returned the full number of poles in

use, as above provided, he shall order the company to pay him forthwith the deficiency ascertained by said examination.

Sec. 14. Every violation of this ordinance shall constitute a misdemeanor, and the corporation or the principal officer thereof in St. Louis violating the same shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars for each offense, and every day's refusal or neglect to pay the amount aforesaid in each year after the first day of August of said year shall constitute a separate offense."

Sec. 2. Section 7 of said ordinance No. 11,604 is hereby repealed.

Approved March 22, 1884.

That sections 11, 12, 13 and 14, above set out, of ordinance 11,604, as amended by ordinance 12,733, continued in force until they were incorporated into and became a part of an ordinance of the City of St. Louis, entitled "An ordinance in revision of the ordinances of the City of St. Louis, and to establish new ordinance provisions for the government of said city," approved April 12, 1887, and being ordinance number 14,000, and they are known and numbered in said revised ordinance as sections 671, 672, 673 and 674 of article 8 of chapter 15, and are in words and figures as follows, to-wit:

Section six hundred and seventy-one. All telegraph and telephone companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of St. Louis, for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city.

Section six hundred and seventy-two. The principal officer located in St. Louis of each and every company

aforesaid shall, during the month of July in each year, file with the city collector a statement in writing, under oath, specifying the number and location of telegraph or telephone poles in use by his company on the first day of July of said year, and said company shall at the same time pay to the city collector for the use of the city said sum of five dollars for each and every pole so shown for the year commencing on the first day of July.

Section six hundred and seventy-three. If the collector shall not be satisfied of the correctness of any statement so made by said officer, he shall have power to require said officer to appear before him with the books and papers of the company and submit to an examination concerning the matters aforesaid; and if it shall be ascertained, to the satisfaction of the collector on said examination, or in any other manner, that said officer has not returned the full number of poles in use, as above provided, he shall order the company to pay him forthwith the deficiency ascertained by said examination.

Section six hundred and seventy-four. Every violation of the provisions of the foregoing section of this article shall constitute a misdemeanor, and the corporation or the principal officer thereof in St. Louis violating the same shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars for each offense, and every day's refusal or neglect to pay the amount aforesaid in each year after the first day of August of said year shall constitute a separate offense.

That on the first day of July, 1884, and from said day to the present time and continuously, the defendant has had, held, owned and used on the streets, alleys and public places of the City of St. Louis, 1,509 telegraph poles, for which it is indebted to the plaintiff for the use of said streets, alleys and public places five dollars per annum for each and every pole; that on July 1, 1887,

there was due and owing from defendant to plaintiff by reason of the matters aforesaid the sum of $22,635, for which, with interest and costs, plaintiff prays judgment.

Thereafter, at the April Term of said court, said case was removed by defendant in error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri. (Rec., pp. 8, 9.)

Thereafter, on the 16th of February, 1889, the following amended answer was filed:

AMENDED ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

City of St. Louis, Plaintiff,
vs.
Western Union Telegraph Co., Defendant.

1. Now comes the defendant, the Western Union Telegraph Company, and, for amended answer to the petition herein, admits that plaintiff is a municipal corporation duly created and existing under the laws of the State of Missouri, as alleged in said petition, and that defendant is, and was at the times in said petition mentioned, a telegraph company and corporation doing business in said City of St. Louis, and using certain of the streets and public places of said city for its telegraph poles, and admits that it was not at any of the said times taxed on its gross income for city purposes; admits that the ordinances in said petition set forth were passed and contain the provisions as therein alleged and set forth, but defendant avers that plaintiff was wholly without authority in law to pass and enact sections eleven, twelve, thirteen and fourteen of ordinance numbered 12,733 in said petition set forth, and was wholly without authority to pass and enact sections 671, 672, 673 and 674 of article 8 of chapter 15 of the revised ordinances of 1887, in said petition set forth,

and that said sections of said ordinance 12,733, and of said revised ordinances are illegal and void as in contravention of the Constitution and laws of said State of Missouri and of the Constitution and laws of said United States; denies that on the first day of July, 1884, and from said day up to the filing of said petition continuously has had, held, owned or used in the streets, alleys and public places of said City of St. Louis 1,509 telegraph poles, as alleged in said petition; and denies that it is indebted to plaintiff for the use of said streets, alleys and public places five dollars per annum or any other sum for each and every pole as alleged; denies that on July 1st, 1887, or at any other time, there was due and owing from defendant to plaintiff, by reason of the matters in said petition set forth, the sum of $22,635 or any other sum.

2. And for another and further defense to the cause of action contained in said petition, defendant avers that it is now, and before and on and since the 24th day of July, in the year 1866, was, and has been, a corporation, chartered, created and organized in the State of New York, under the laws of the said State of New York, and that defendant owns, controls or uses lines of telegraph in various parts of the United States, and in the said City of St. Louis, constructed and maintained, as hereinafter more particularly set forth, in the said City of St. Louis, over and along the post-roads of the said United States in the said City of St. Louis, which have been declared to be such by law, and over, under and across a navigable stream of water of the said United States, to-wit, the Mississippi river, adjoining the said City of St. Louis and State of Missouri; that on, to-wit, the fifth day of June, in the year 1867, defendant duly accepted, and thereafter, to-wit, on the 12th day of June, in said last-mentioned year, duly filed its written acceptance with the Postmaster-General of the United States of the restrictions and obligations required by law under and in accordance with the Act of Con-

gress of the United States of July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes."

Defendant avers that upon said filing it became entitled to and had, and hath ever since had, the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States, and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several departments of the Government of the United States and their officers and agents in their transmission over the lines of the said defendant, at such rates as the said Postmaster-General has annually fixed or shall annually fix, and to sell all its telegraph lines, property and effects to the United States at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by said Postmaster-General, two by defendant, and one by the four so previously selected, and also liable to a penalty of not less than one hundred or more than one thousand dollars for each refusal or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by title LXV. of the Revised Statutes of the United States, or by the provisions of section 221 of said Revised Statutes, title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and sea-board of the approach and force of storms.

Defendant avers that its lines of telegraph aforesaid,

extend to and from the City of St. Louis and State of Missouri, into and through most of the States and Territories of the United States, and to the City of Washington, in the District of Columbia, and connect with those owned and established by the Government of the United States for public purposes, and that defendant is in close communication with other telegraph companies doing business in the said United States and other countries; and so defendant avers that the lines of telegraph erected and maintained by it in the said City of St. Louis, as hereinafter more particularly set forth, were so erected and have been and are maintained in pursuance of, and subject to, the provisions of the laws of the United States aforesaid, and that it has submitted to and accepted the conditions aforesaid, imposed by said laws, and has declared its purpose and desire to avail itself of the privileges granted by said laws aforesaid.

Defendant further avers that, in the exercise of the powers and privileges conferred upon it by law, as aforesaid, it did, on and before and since the first day of July, 1884, construct, operate and maintain lines of telegraph in the said City of St. Louis, hereinafter more particularly set forth, upon, over and along the post-roads of the United States in the City of St. Louis, declared to be such by law, lying in the said city and over, under and across the said Mississippi river, a navigable stream of water of the said United States, adjoining said city, and did and does transact its general business, and for a long time and ever since the filing of the written acceptance aforesaid, has transmitted to, and does continually and constantly transmit from, into and through the said City of St. Louis telegrams between the several departments of the Government of the United States and the officers and agents thereof such telegraphic communications as are provided for as aforesaid by law, at rates fixed as aforesaid by said Postmaster-General, and for and between other persons residing in the different States of the United States and in

foreign countries, on and over said lines maintained on and along said post-roads in the said City of St. Louis, and on and over other lines of telegraph connected therewith, owned, controlled, or used and maintained by defendant in and through other parts and States of said United States, and thereby became and was, and prior to the year 1884 and at all times since has been, an instrument of foreign and interstate commerce and a Government agent for the transmission of Government business, and of messages on public business and commercial and other messages between the said City of St. Louis and the various States of the United States and foreign countries and points therein, and over and through said City of St. Louis from and to the various States of the United States and foreign countries and points therein; and made and makes use of said lines on and along said post-roads in the City of St. Louis, and uses the privileges and franchises granted and secured to it by said Act of July 24th, 1866, on and along said post-roads for foreign and interstate commerce, and in and for the service and business of the United States, which, as aforesaid, defendant is bound to render and perform and defendant as aforesaid does render and perform.

Defendant further avers that continuously, between the first day of July, 1884, and the first day of July, 1887, defendant used in the sidewalks of the said City of St. Louis, to-wit, one thousand and fifty telegraph poles, and that during said period defendant used in the streets and public places of the said City of St. Louis (other than said sidewalks), to-wit, three hundred and fifty telegraph poles, making a total of fourteen hundred telegraph poles; that all of the sidewalks aforesaid in and on which the poles of defendant aforesaid are used and have been used, immediately adjoin the streets of the said City of St. Louis, and that said poles upon which the wires, used by defendant in said business are strung, are and were during all of said time along and adjoining the said streets. Defendant avers

that the said streets and public places of the City of St. Louis are and were at all times, between the said first day of July, 1884, and the said first day of July, 1887, established post-roads of the said United States under and in pursuance of the laws of the said United States, and of the authorized rules and regulations of the officers and departments of the United States made, passed and adopted in pursuance of said laws.

Defendant further avers that, while under the ordinances of the said City of St. Louis in said petition set forth, plaintiff claims compensation from or payment by defendant of the sum of five dollars per annum on account of each and every telegraph pole, as mentioned in said petition, held, owned or used by defendant in the streets, alleys and public places of the City of St. Louis during the period mentioned in said petition as and for the privilege of using said streets, alleys and public places; that in fact said sum so sought to be assessed against and recovered from defendant by plaintiff is a privilege or license tax upon defendant for carrying on its said business in the said City of St. Louis, and that the assessment of said tax and its attempted enforcement and collection are in violation of the provisions of article one, section eight, paragraphs three and seven of the Constitution of the United States and of the laws of the said United States, and that said ordinances, in so far as the same require the payment by defendant of the sum aforesaid as aforesaid, are illegal and void, as in contravention of said constitution and laws.

And for another and further defense to the cause of action contained in said petition, defendant avers that during all of the said period between the said first day of July, 1884, and the said first day of July, 1887, defendant was required by the provisions of ordinances of the said City of St. Louis, in force during said period, to-wit, ordinance number 11,604, approved February 25th, 1881, set forth in said petition, and by the provisions of sections 665 and

667 of chapter 15, article 8, of Revised Ordinances, 1887, of said City of St. Louis, to refill any excavation by it made, and to restore any sidewalk, gutter, street or alley pavement by it displaced or injured in the alteration, erection or removal of any telegraph pole belonging to it, and was further required to keep on deposit with the treasurer of said City of St. Louis, subject to the order of said street commissioner, under a penalty prescribed by said section 667, the sum of fifty dollars, to be used in making such restoration upon the failure or refusal of defendant to make such restoration to the satisfaction of said commissioner. Defendant avers that at all times during said period it fully complied with the requirements of said ordinances in every respect, and did all things by it required to be done in pursuance thereof.

Defendant avers that during said period defendant used in the sidewalks of the said City of St. Louis, to-wit, one thousand and fifty telegraph poles, and during said period defendant used in the streets, alleys and public places of said city (other than said sidewalks), to-wit, three hundred and fifty telegraph poles, and that all of said poles were erected prior to said first day of July, 1884; that during said period the owners of property fronting upon said sidewalks in which the poles of defendant were used as aforesaid, were required by the provisions of ordinances of said City of St. Louis, to-wit, section 3, chapter 15, article 1, Revised Ordinances, 1881, and section 551, chapter 15, article 1, Revised Ordinances, 1887, to make all repairs to said sidewalks, and upon failure to make such repairs the same to be made by said street commissioner, and the cost thereof assessed as a special tax on the property fronting said sidewalks; that during said period said street commissioner was required by ordinances of said City of St. Louis, to-wit, section 4, chapter 15, article 1, Revised Ordinances of 1881, and section 557, chapter 15, article 1, Revised Ordinances of 1887, to make all needed

repairs to the pavements of said alleys in which the poles of defendant were used as aforesaid, the cost of such repairs to be assessed as a special tax on the property abutting upon said alleys.

Defendant further avers that during all of the period between said first day of July, 1884, and said first day of July, 1887, all of the property of defendant within the said City of St. Louis was duly assessed in pursuance of law, upon its valuation, for purposes of taxation by the said State of Missouri and the said City of St. Louis, and that all taxes assessed and levied upon said property for said period, in pursuance of law as aforesaid for said State and city purposes, have been paid by defendant to said State and city respectively.

Defendant further avers that the ordinances set forth in plaintiff's petition impose upon defendant a burden and tax additional to the taxes assessed against and paid by defendant as aforesaid, without any corresponding or special benefit or advantage to defendant, and that said ordinances, in so far as the same provide for and require the payment by defendant to plaintiff of the sum of five dollars per annum for each and every telegraph pole used by defendant as foresaid, are unreasonable, unjust, oppressive and void.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

COCHRAN, DICKSON & SMITH,
Attorneys for Defendant.

Thereafter, on the 16th of February, 1889, the following reply was filed:

REPLY.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF MISSOURI.

The City of St. Louis, Plaintiff,
vs.
The Western Union Telegraph Co., Defendant.

The plaintiff comes and replies to the answer herein, and denies each and every allegation contained in said answer, and prays judgment as prayed in the petition by

LEVERETT BELL,
Its Attorney.

TRIAL.

On the 6th of May, 1889, the cause was tried upon an agreed statement of facts and oral testimony.

AGREED STATEMENT OF FACTS.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

City of St. Louis, Plaintiff,
vs.
The Western Union Telegraph Co., Defendant.

For the purpose of trial of the above entitled case the following facts are admitted, but objections to the admission of such facts in evidence on the ground of incompetency, irrelevancy or immateriality, or any other proper objection in law may be made at the trial by either party:

1st. It is admitted that defendant, on the first day of July, 1884, and from that day up to the institution of this suit, has had, held, owned and used in the streets, alleys and public places of the City of St. Louis, Missouri, fifteen hundred and nine telegraph poles, of which ten hun-

dred and fifty were in the sidewalks of said city; that said poles were erected prior to said first day of July, 1884. It is also admitted that defendant was not at any time during the period from said first day of July, 1884, to the institution of this suit, taxed on its gross income for city purposes.

2d. It is agreed that either party may use in evidence printed copies of any of the ordinances of the said City of St. Louis referred to in the pleadings, or any ordinances of said city material to the issue in this case with the same force and effect as if certified according to law.

3d. It is admitted that defendant is now, and ever since and before the 24th day of July, 1866, has been a corporation chartered, created and organized under the laws of the State of New York, and that it is a citizen of said State.

4th. That during all the times mentioned in the petition, and up to the present time, defendant has owned, controlled and used lines of telegraph in various parts of the United States and in the City of St. Louis; that its lines run over, under and across the Mississippi river adjoining the City of St. Louis: that its lines extend to, through and from the City of St. Louis into and through most of the Territories and States of the United States and to the City of Washington, in the District of Columbia, and that the lines of defendant connect with those owned by the Government of the United States and used for public purposes; that defendant is in close connection with other telegraph companies doing business in the United States and foreign countries.

5th. It is admitted that defendant on, to-wit, the fifth day of June, 1867, duly accepted and on, to-wit, the 12th day of June, 1867, duly filed its written acceptance with the Postmaster-General of the United States of the provisions, restrictions and obligations required by law under and in accordance with the Act of the Congress of

the United States, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and that said acceptance has never been withdrawn.

6th. That defendant, since the filing of said written acceptance, has transmitted to, and does constantly transmit from, into and through the said City of St. Louis telegrams between the several departments of the Government of the United States and its officers and agents on governmental business at rates fixed annually by the Postmaster-General of the United States; that it also transmits telegrams for and between persons residing in different States of the United States and in foreign countries, on and over the lines maintained by it in the City of St. Louis, on and over other lines connected therewith, owned, controlled or used by defendant in the several parts of the United States.

7th. It is admitted that defendant, during all the times mentioned in the petition, fully complied with the requirements of ordinance 11,604, approved February 25th, 1881, and with the provisions of sections 665 and 667 of chapter 15, article 8, Revised Ordinances, 1887, of the City of St. Louis.

8th. It is admitted that defendant, during the years 1884, 1885, 1886 and 1887, paid the taxes as shown in the accompanying Exhibits "A," "B," "C" and "D;" that said taxes were assessed by the persons, officers and authority therein mentioned; that said exhibits are the original receipted tax bills issued to defendant upon payment of said taxes.

9th. Either party shall have the right to introduce

testimony at the trial not in contradiction of or inconsistent with the foregoing admissions.

LEVERETT BELL,
City Counselor, City of St. Louis, Pl'ff.
COCHRAN, DICKSON & SMITH,
Attorneys for Defendant.

(Rec., pp. 19 to 20 inclusive.)

Plaintiff in error introduced ordinance No. 11,-604; ordinance No. 12,733 and §§ 671, 672, 673 and 674 of article 8, of chapter 15, Revised Ordinance, City of St. Louis, 1887, being the same ordinance and sections of the Revised Ordinance which are set out in full in plaintiff's petition. (Rec., pp. 20–24, inclusive.)

TESTIMONY.

Plaintiff proved by the testimony of John Lindsay, Chief of the Fire Department, that the telegraph wires of the defendant in error seriously interfered with the operations of the fire department, especially in the business portions of the city, and constituted an obstacle in the extinguishment of large fires, beside being hazardous to the fireman; that frequently they prevented the ladders being raised so as to reach the upper stories of large buildings, and impaired the force of the stream of water thrown by the engines on the fires, so much so that it frequently became necessary to cut the wires in order to reach the buildings or to extinguish the fires. (Rec., pp. 25-28.)

Plaintiff in error then rested.

Defendant in error then asked the court to de-

clare the law to be that the plaintiff was not entitled to recover, which the court refused to do.

Defendant in error then offered in evidence §§ 3 and 4 of article 1, Revised Ordinance, City of St. Louis, 1881, being §§ 551 and 557 of chapter 15, article 1, Revised Ordinance, 1887, which provided that when a sidewalk is out of repair, the street commissioner shall notify the owner of the property fronting thereon to have the same repaired, and if such owner fails so to do the street commissioner shall cause the work to be done and assess the cost thereof as a special tax on the property fronting thereon, and a like procedure in case of an alley being out of repair. (Rec., pp. 28 and 29.)

Defendant in error then showed by William E. McHenry, Assistant Postmaster of the United States at St. Louis, that he considered that the letter-carrier routes of the City of St. Louis embraced the streets of said city; that such carriers of mail made deliveries along said streets and collections from boxes located in such streets under orders from the Postmaster-General through the general delivery superintendent. (Rec., p. 29.)

Defendant in error futher proved by the testimony of W. W. Murray, who was a special inspector of the street department of the City of St. Louis, and whose duty it was to look after the erection of all telegraph, telephone and electric light poles and the stringing of wires, that he approved permits for the erection of poles for the carrying of wires and cables in the City of St. Louis and of those so erected by defendant in error. (Rec., pp. 29, 30 and 31.) On cross-examination the witness

stated that the wires of the telegraph and electric companies seriously interfered with the extinguishment of fires; that he had heard of a number of persons who had been injured by such wires; that the poles of defendant in error occupied about two and one-fourth square feet, each, of the street. (Rec., pp. 31, 32 and 33.) On re-examination the witness testified that the city used some of the poles of defendant in error for fire and police telegraph wires. (Rec., p. 34.)

Defendant in error further proved by the testimony of Rudolph H. Bohle, its manager at St. Louis, that its poles had been erected from time to time from 1848 up to March 22, 1884, and that very few had been erected since that date. (Rec., pp. 35-38.)

Defendant in error further proved by the testimony of W. F. Warrance, its foreman in St. Louis, that some of the poles of defendant were used by plaintiff in error for its fire and police lines of wires; that defendant in error used a number of poles belonging to the city amounting to probably one hundred. (Rec., pp. 38 to 42.)

Defendant in error further proved by L. C. Baker, its superintendent in St. Louis, that its poles were erected under permits from the city; that defendant used about one hundred and fifty poles belonging to the city. (Rec., pp. 42 to 44.)

Defendant in error then read in evidence a certified copy of the acceptance by defendant of the provisions and restrictions of the Act of Congress of July 24th, 1866. (Rec., p. 45.)

Defendent in error then read in evidence tax bills

showing the payment of State, school and city taxes for the years '84, '85, '86 and '87, together with the assessment of the value of its property as fixed by the State board of equalization for said years; the amount of taxes on personal property paid being $41.56 for 1884; $86.70 for 1885; $16.06 for 1886, and $17.25 for 1887; for State, school and city taxes on personal property, $435.15 for 1884, $500.38 for 1885, $525.75 for 1886, and $515.42 for 1887; being the assessment for said years by the State board of equalization. (Rec., pp. 46 to 50.)

In rebuttal, plaintiff proved by the testimony of Mr. Hilgendorf that defendant in error used between two and three hundred poles belonging to the City of St. Louis; that the city used about eight hundred poles belonging to defendant in error. (Rec., p. 50.)

This was all the testimony offered.

Thereupon the plaintiff in error asked the court to give the following instruction which the court refused to do, and plaintiff duly excepted at the time, to-wit:

"The court declares the law to be that under the pleadings and evidence plaintiff is entitled to judgment for $22.635.00, with interest at the rate of six per cent. per annum from the day the action was commenced." (Rec., p. 52.)

Afterwards, on the 19th of June, 1889, the court rendered judgment for the defendant, filing the following written opinion:

OPINION.

THAYER, DISTRICT JUDGE:

"On March 23d, 1884, the Municipal Assembly of the City of St. Louis amended ordinance No. 11,604, entitled 'An ordinance to regulate the erection of telegraph and telephone poles,' by adding thereto four new sections, numbered 11, 12, 13 and 14.

Section No. 11 is as follows:

'From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of St. Louis for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city.'

Suit in the nature of an action of debt is brought under this section to recover the sum of $22,635, which is alleged to have become due in consequence of the use by the defendant of 1,509 telegraph poles since July 1st, 1884, said poles having been erected prior to that date.

A question is raised as to the right of the plaintiff to sue in such form, inasmuch as the ordinance contains no provisions touching the manner of bringing suits to enforce the payment of the tax, but, waiving that question, I am of the opinion that judgment must be entered for defendant on other and more meritorious grounds, also urged by defendant's counsel.

The City of St. Louis was originally authorized by its charter 'to license, tax and regulate * * * telegraph companies, etc.,' but its power to tax the property, real and personal, of telegraph companies, including their franchises, was taken away by implication by an act approved on the twenty-first of April, 1877, now section 6,901 of the Revised Statutes of Missouri.

Section 11 of the ordinance cannot be supported, therefore, as an exercise of a taxing power vested in the municipality, unless it be contended that the municipality still has power to impose a 'privilege tax' on telegraph companies, and that the charge in question of five dollars per pole is in the nature of a privilege tax levied against the defendant—that is to say, a tax imposed on it as a condition precedent to its right to carry on the telegraph business in the City of St. Louis.

Inasmuch as telegraphs are instruments of interstate commerce, and as defendant's lines extend into all parts of the United States, and its wires in the City of St. Louis, Missouri, are used daily to transmit messages to all parts of the United States, it is clear that neither the State or the municipality can impose upon it a privilege or license tax.

Almy v. California, 24 Howard, 169.
Crandall v. Nevada, 6 Wall. 35.
State Freight Tax, 15 Wall. 232.
Pullman Car Co. v. Nolan, 22 Fed. Rep. 276.
Leloup v. Mobile, 127 U. S. 640.

The State may tax such property, real or per-

sonal, of the defendant as is located within its borders at such just rate and in such manner as the legislature may prescribe consistently with the laws of the State.

Telegraph Co. v. Mass., 125 U. S. 530.

The State of Missouri has exercised that power and has provided how the property of telegraph lines shall be taxed through the medium of a board of equalization, thereby withdrawing the taxing power from the municipality.

In no aspect of the case, therefore, can the section of the ordinance in question be sustained as a valid exercise of any taxing power vested in the city.

It is obvious, I think, that the ordinance cannot be upheld under the power conferred on the municipality 'to regulate' telegraph companies. By virtue of such power the city authorities may undoubtedly make reasonable regulations touching the location of telegraph poles, their height and size, and very likely, as was recently held by Judge Wallace in the Southern District of New York, may require them to be carried underground rather than overhead.

The section of the ordinance on which the suit is based is not, however, a regulation of that character, nor is it in any proper sense a regulation within the meaning of the city charter. The object of the enactment was evidently to secure revenue for the municipality. Hence the burden imposed is a tax, and it is imposed in such form that it can

only be regarded as a privilege or license tax which the city has no authority to impose.

Judgment will be entered for defendant."

On the following day the plaintiff moved for a new trial in words and figures following, to-wit:

MOTION FOR NEW TRIAL.

UNITED STATES CIRCUIT COURT, EASTERN DIVISION, EASTERN DISTRICT OF MISSOURI.

The City of St. Louis, Plaintiff,
vs.
The Western Union Telegraph Co., Defendant.

The plaintiff moves for a new trial herein:

1. Because the judgment should have been for the plaintiff and not for the defendant.

2. Because the court erred in refusing to give the instructions asked by plaintiff.

3. Because the court erred in giving instructions.

LEVERETT BELL,
Plaintiff's Attorney.

(Rec., p. 17.)

The court overruled the motion for new trial, plaintiff duly excepting thereto, and thereupon the cause was brought to this Honorable Court by writ of error.

STATEMENT OF THE CASE.

This is an action by the City of St. Louis, a municipal corporation, to recover from the Western Union Telegraph Company, a private business corporation, the sum of $5 per pole per year, for 1,509 telegraph poles which the defendant had in use on the streets, alleys and public places of the City of St. Louis, between the first day of July, 1884, and on the first day of July, 1887, under authority of ordinances of the City of St. Louis, numbers 11,604 and 12,733.

Section 11 of ordinance 11,604, as amended by ordinance 12,733, prescribes as follows: "From and after the first day of July, 1884, all telegraph companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of St. Louis, *for the privilege of using the streets*, alleys and public places thereof, the sum of $5 per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city."

The answer of the defendant, after admitting the incorporation of the plaintiff and of the defendant, and after admitting that it used certain of the streets and public places of the city for its telegraph poles, and that it was not at any time taxed on its gross income for city purposes, sets up the following defenses, to-wit:

First. That ordinance 12,733 is illegal and void as in contravention of the Constitution and

laws of the State of Missouri and of the Constitution of the United States.

Second. That defendant owns lines of telegraph in various parts of the United States which are connected with and constructed over and along the post-roads of the United States in the City of St. Louis, and across the navigable waters of the United States, to-wit, the Mississippi river adjoining the City of St. Louis, and that on the fifth of June, 1867, the defendant accepted, and thereafter on the twelfth of June filed its written acceptance with the Postmaster-General of the United States, the restrictions and obligations of the Act of Congress of July 24th, 1866, and avers that by so doing it acquired a right to construct, maintain and operate telegraph lines through any portion of the public domain of the United States, over any military or post-roads of the United States, and that it has ever since complied with said act; that its lines extend from the City of St. Louis to all parts of the United States and connect with those owned and established by the Government of the United States and with other telegraph companies doing business in the United States; that continuously between the first of July, 1884, and the first of July, 1887, it used in the sidewalks in the City of St. Louis certain poles on which were strung the wires used by the defendant in its business; that whilst the ordinance of the city required the payment of said sum for the use of the streets, alleys and public places as aforesaid, such sum was in reality a privilege or license tax upon the defendant for carrying on its business in the City of St. Louis, and was in violation of the

provisions of article 1, section 8, paragraphs 3 and 7 of the Constitution of the United States, and hence was void.

Third. That during the time aforesaid defendant had complied with the provisions of ordinance 11,604 and refilled all excavations made by it in said streets, alleys and public places for the purposes of erecting said telegraph poles, and had constantly kept on deposit with the treasurer of the City of St. Louis the sum of fifty dollars required by such ordinance.

Fourth. That during the times aforesaid section 3, chapter 15, article 1, Revised Ordinances, 1881, required the owners of property fronting upon sidewalks in which the poles of defendant were used to make all repairs of sidewalks, and upon failure so to do, authorized the street commissioner to have the work done and assess the cost thereof as a special tax against the abutting property.

Fifth. That during said times all the property of defendant within the City of St. Louis was duly assessed in pursuance of law upon its valuation, for the purposes of taxation by the State of Missouri and the City of St. Louis, and that such taxes had been paid by defendant. That the ordinance aforesaid imposed upon defendant a burden and tax additional to the taxes assessed and paid by defendant as aforesaid without any corresponding or special benefit or advantage to defendant, and that said ordinances are therefore unreasonable, unjust, oppressive and void.

By the agreed statement of facts it was admitted that the defendant during the times aforesaid

had and used in the streets, alleys and public places of the City of St. Louis 1,509 telegraph poles, of which 1,050 were in the sidewalks; that said poles were erected prior to the first day of July, 1884; that defendant was not at any time taxed on its gross income for city purposes; that the defendant owned and used lines of telegraph in various parts of the United States, extending to, through and from the City of St. Louis into and through most of the Territories and States of the United States and connected with those owned by the Government and used for public purposes, as well as with other lines belonging to other telegraph companies; that the defendant duly accepted the provisions of the Act of July 24, 1866; that defendant since said acceptance has continued to transmit telegrams between the several departments of the Government of the United States and its officers and agents on governmental business at rates fixed annually by the Postmaster-General of the United States, and also for and between persons residing in different States of the United States on and over the lines maintained by it in the City of St. Louis and elsewhere; that defendant has fully complied with the requirements of ordinance 11,604, and with the ordinance provisions aforesaid, in reference to refilling excavations made by it; that defendant has paid the taxes as alleged in its answer.

The existence and maintenance of defendant's wires on the streets of St. Louis were shown to be hazardous to fireman and an obstacle in the way of the extinguishment of fires.

The defendant showed that the carriers of mail

in the City of St. Louis made deliveries and collections along the routes of the several streets in the City of St. Louis. It was also shown that the defendant had placed its poles in the streets of said city in pursuance to permits issued by the city under authority of ordinance 11,604 (set out in full on pages 20 to 22 of the record). It was further shown that the defendant used 150 to 200 poles belonging to the city and that the city used some eight hundred poles belonging to the defendant, for which no charge was made by either. The telegraph poles each occupy a space of about two and one-fourth square feet of the streets, alleys and other public places.

The Circuit Court decided in favor of the defendant, holding that the original authority of the city under its charter "to license, tax, and regulate * * * telegraph companies, etc.," was taken away by implication by an Act of the General Assembly of Missouri, approved April 21, 1877; that § 11 of ordinance 11,604, as amended by ordinance 12,733, was a "privilege tax" on defendant imposed as a condition precedent to its right to carry on the telegraph business in the City of St, Louis, and hence was in conflict with the interstate commerce laws of the United States and therefore void under the Constitution of the United States.

ASSIGNMENT OF ERRORS RELIED UPON BY PLAINTIFF IN ERROR.

First. Ordinance No. 11,604, as amended by ordinance No. 12,733, is a valid ordinance.

Second. Said ordinance is not in conflict with paragraph 3, § 8, article 1 of the Constitution of the United States.

Third. Said ordinance is not in conflict with paragraph 7, § 8, article 1, Constitution of the United States.

Fourth. Said ordinance does not conflict with any rights acquired by defendant under the Act of Congress of July 24th, 1866.

Fifth. Said ordinance is not in conflict with or impaired by §§ 665 and 666 of chapter 15, article 8, Revised Ordinance, City of St. Louis, 1887, nor with § 3, chapter 15, article 1, Revised Ordinance, 1881.

Sixth. The payment of general taxes does not affect in any manner the questions involved in this case.

Seventh. The ordinances are reasonable and just.

Eighth. The power of the city to license, tax and regulate telegraph companies was not taken away by implication by the Act of the General Assembly of Missouri, approved April 21st, 1877.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

I.

ORDINANCE NO. 11,604, AS AMENDED BY ORDINANCE NO. 12,733, IS A VALID ORDINANCE.

It will not be contended in this case that the City of St. Louis has a right to pass any ordinance in any manner, regulating or interfering with interstate commerce. If, in my judgment, there could reasonably be any contention that the power of the city, as exercised by the passage of the ordinance in question, in any way conflicted with the Constitution of the United States in reference to interstate commerce, or in reference to the establishment of post-roads, I would not trouble this Honorable Court with a consideration of this case. But because I am satisfied that, properly considered, the ordinance in question cannot be so construed by any fair process of construction, I shall earnestly urge the right of the city to recover in this case.

The streets and alleys of a city are local improvements and under the control of the local authorities. Sec. 10, article 10 of the Constitution of Missouri, 1875, prescribes that: "The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Section 20, of Art. 12 of the Constitution of Missouri, 1875, prescribes that: "No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, or village or any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchise so granted shall not be transferred without similar assent first obtained."

The City of St. Louis is a municipal corporation, created by virtue of §§ 20 to 25, inclusive, of Art. IX. of the Constitution of Missouri. Its charter was framed by a board of freeholders pursuant to this constitutional grant.

Among its charter powers it is provided by paragraph 2, of § 26 of Art. III. as follows: The mayor and assembly shall have power within the city by ordinance, not inconsistent with the constitution or any law of this State or of this charter, to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers and drains, *and to regulate the use thereof*, etc."

The fifth paragraph of the same section gives the power: "To license, tax and regulate * * *."

(enumerating many classes of business) telegraph companies or corporations, street cars, etc."

Sections 2 to 11 of article 6 of the charter prescribe the methods to be pursued by the city for condemnation of property for opening, widening or altering any street, avenue, alley, wharf, market place or public square, etc.

Section 21 of Art. IX. of the Constitution of Missouri requires all courts to take ~~original~~ judicial notice of the charter and charter provisions of the City of St. Louis.

So far, therefore, as the State of Missouri has control of the matter, it has by its constitution and by the charter granted to the City of St. Louis by the people of the State of Missouri, clearly and emphatically declared that the streets of the City of St. Louis shall be subject to the control of the municipality, with full power to regulate the use of the same.

The Government of the United States owns no foot of any of the streets of the city, pays nothing for their establishment, contributes nothing to their maintenance, and has no power to prevent the City of St. Louis from exercising the right conferred by paragraph 2 of § 26, article 3 of its charter, to vacate such streets whenever the municipal authorities think proper.

In exercising its charter and constitutional powers and providing for the regulation of the use of its streets, alleys and public places the City of St. Louis enacted ordinance No. 11,604 and amended said ordinance by ordinance No. 12,733.

In so doing it did not attempt to levy any kind

of a tax upon the defendant in error. § 11 of the amended ordinance in terms prescribes that telegraph and telephone companies shall pay to the City of St. Louis, for the privilege of *using* the streets, alleys and public places thereof, the sum of five dollars per annum for each pole. This was strictly within the power of the city. The State of Missouri, under its constitution, could not grant the right to use the streets of the city to any person whomsoever without the consent of the city, and the consent of the city could only be obtained upon such terms and under such regulations as the city might prescribe by ordinance for the use thereot.

The true meaning of the word "regulate" has been given by this court in the case of Gibbons v. Odgen, 9 Wheaton, p. 196, and may, in a word, be said to be the power to prescribe the rule by which a thing, or the use of a thing, is to be governed.

It will not be contended in this case that telegraph communications are not commerce. This court has settled that proposition. It is contended, however, that Congress in regulating interstate commerce has no power to authorize the use of the streets of a municipality, contrary to local regulations. In other words, that Congress can only secure to strangers the same right that residents of the locality have to use the street.

In the case of Philadelphia and Reading Railroad Co. v. Pennsylvania, 15 Wallace, 232, this court lays down the rule as follows: "We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be

the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of highways or means of conveyance. The State is not herself the owner of the roadways (in this case a railroad) nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals the State has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship."

Just so in this case is the amount charged by this ordinance a toll; a demand of proprietorship by the owner of the domain; a return for a beneficial use and for facilities furnished to defendant in error by plaintiff in error.

Upon the same principle here contended for it has been finally settled by this court, that a municipality has the right to charge wharfage dues for boats landing at improved portions of the wharf, in return for the facilities thus afforded.

Cannon v. City of New Orleans, 87 U. S. 417.
Packet Co. v. Keokuk, 95 U. S. 80.

Union Packet Co. v. City of St. Louis, 100 U. S. 423.

Packet Co. v. Catlettsburg, 105 U. S. 559.

Transportation Co. v. Parkersburg, 107 U. S. 691.

II.

SAID ORDINANCE IS NOT IN CONFLICT WITH PARAGRAPH 3, § 8, ART. 1, CONSTITUTION OF THE UNITED STATES.

The constitutional provision referred to provides that: "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The ordinance in question does not attempt to regulate in any manner interstate commerce, nor to prescribe any rule, regulation, privilege or restriction for persons engaged in such business. It imposes no tax upon the defendant as a condition precedent to its right to do buisness; it does not require the defendant to transact its business in any particular way nor at any particular place, but simply requires a toll for the use of its streets. Citizens and resident corporations are required to yield to the public revenue something in return for the facilities afforded by the municipality for travel in the locality. Citizens pay vehicle taxes, street railroads pay license taxes or contribute in other ways toward the cost of maintaining the facility afforded for travel. Every person who constantly uses the property of the city and the facility afforded by the city, ought, in good conscience, to pay for such use. A stranger passing through the

city could not be expected to contribute anything for such casual use. Such, however, is not the character of the use enjoyed by the defendant in error. Its enjoyment of this use is permanent. Neither the United States nor the State of Missouri has the power to compel a locality to establish a street nor to keep the same in order. Such questions are governmental and local. The locality bearing the expense has the right to provide the terms upon which such streets and alleys may be used. In early times the cost of maintaining roads was largly recouped by charges collected at toll-gates. Such tolls were never considered as unlawful exactions, or as in any manner imposing hardships upon citizens or strangers, nor as interfering with interstate commerce. The modern idea of raising the money to keep up streets varies only in form, and not in principle, from the ideas of our ancestors.

It is true that, as at present constructed, the business of the defendant in error is conducted by means of wires strung on poles; that without such wires its business could not be carried on, but it does not follow that without the poles the business could not be carried on. On the contrary, as alluded to by the district judge in this case, it has recently been held by Judge Wallace, in the Southern District of New York, that the municipality under its power to regulate telegraph companies has a right to compel them to carry their wires underground and not overhead. If the wires were carried underground there would be no unsightly poles along public highways, streets and boulevards, and no

danger or inconvenience or obstacle in case of fires in large cities. In short, the telegraph company would not be occupying so much of the surface of the street and thereby destroying to that extent the usefulness of the street for the purposes for which streets are constructed. Placed underground, as such wires should be placed, there would be more reason in objecting to the payment of a toll for the use of the street.

It cannot, therefore, logically, be said that the ordinance in question conflicts with the constitutional provision conferring upon Congress the right to regulate interstate commerce.

The case of Leloup v. Mobile, 127 U. S. 640, cited by the district judge, differs from the case at bar in this, that in the former the poles and lines were set up and maintained along and over rights of way belonging to railroads and not to the City of Mobile, whereas in the case at bar the poles are set on the property of the City of St. Louis, over which it exercises dominion and has sovereignty.

The ordinance in question in this case does not conflict with the constitutional provision aforesaid nearly so much so as the Act of the General Assembly of Missouri, approved May 16th, 1889, taxing express companies upon business of such companies done within the State of Missouri. The validity of the last-named act was called in question in the case of Pacific Express Company v. Seibert, 142 U. S. 339, and the objection was urged there, as here, that the act imposed a tax upon interstate commerce. In that case this court said: "It is well settled that a State cannot lay a tax upon interstate

commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transported, or on the occupation or business of carrying it on, for the reason that such taxation is a burden upon commerce and amounts to a regulation of it, which belongs to Congress. * * * The question on this branch of the case, therefore, is: Was the business of this express company in the State of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that, in the transaction of its business as an express company, the complainant is engaged, in part, in the transportation of goods and other property between the States of Nebraska, Kansas, Texas and other States of the Union, and the State of Missouri, and also in the business of carrying goods between different points within the limits of the State of Missouri. The question on this point, therefore, is narrowed down to the single inquiry whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its interstate business. We think a proper construction of the statute confines the tax which it creates to the interstate business and in no way relates to the interstate business of the company."

The decision in this case would seem to be ample authority for the support and validity of the ordinance in question in the case at bar.

III.

SAID ORDINANCE IS NOT IN CONFLICT WITH PARAGRAPH 7, § 8, OF ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES.

This constitutional provision gives to Congress the power "to establish post-offices and post-roads."

The streets of the City of St. Louis are not owned by the Government of the United States, nor maintained by it, nor could the City of St. Louis be compelled to keep up the same, but might at any time abandon and vacate them.

It is true that § 3964, chapter 9, title XLVI., Revised Statutes United States, establish as post-roads, "All letter-carrier routes established in any city or town for the collection and delivery of mail matters." It is also true that the letter-carriers in the City of St. Louis deliver and collect mail on the streets of the city. But neither of these considerations give to Congress or to the defendant in error the right to use such streets, except upon such terms as are prescribed by the local authorities to whom they belong and who bear the expense of their maintenance, such regulations or terms being only subject to attack on the ground of their unreasonableness.

IV.

SAID ORDINANCE IS NOT IN CONFLICT WITH ANY RIGHTS ACQUIRED BY DEFENDANT UNDER THE ACT OF CONGRESS OF JULY 24TH, 1866.

This act simply authorized telegraph companies to construct, maintain and operate telegraph lines

through and over any portion of the public domain of the United States, through and along any of the military or post-roads of the United States, that have been, or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States.

In short, it gave the only right which the Government could give—that is, the right to use the public domain of the United States.

In the case of Western Union Telegraph Co. v. Attorney-General of the Commonwealth of Mass., 125 U. S. 530, this court, construing this act, said: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its line along roads not built nor owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such company owed no

obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of Western Union Telegraph Co. v. Texas, 105 U. S. 460, this question was ~~never~~ more fully considered; and while a tax imposed upon every telegram passing over its lines, whether entirely within the State, or coming from without its limits, or going from the State out of it, was held to be void so far as relating to messages passing through more than one State, as an interference with or a regulation of commerce, and with the Act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In the same case this court emphasizes the doctrine that the property of the Western Union Telegraph Company in a State is subject to taxation the same as other property, and illustrates, that if it were not so every railroad company would be exempt from taxation by the States, because they have all been declared post-roads. The court also cites, with approval, the case of Union Pacific Railroad v. Peniston, 85 U. S. 5, and says: "The argument was pressed in that case that the railroad company held its franchise from the Government of the United States, and that its property could not be taxed by the State." But this court held otherwise, and in the opinion used this language: "It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the gen-

eral Government or interfere with its operations to such an extent, or in such manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxation may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or to prevent their efficient exercise."

See also

Attorney-General Mass. v. Western Union Tel. Co., 141 U. S. p. 40.

V.

SAID ORDINANCE IS NOT IN CONFLICT WITH OR IMPAIRED by §§ 665 AND 666 OF CHAPTER 15, ARTICLE 8, REVISED ORDINANCE, CITY OF ST. LOUIS, 1887, NOR WITH SECTION 3, CHAPTER 15, ARTICLE 1, REVISED ORDINANCE, 1881.

I am at a loss to understand why the defendant in error pleaded these ordinance provisions. They throw no light upon the question here involved, and if they are worth anything as an argument they

strongly tend to show the fallacy of the defendant's contention in this case.

If it be true that defendant derives its power from Congress by virtue of the interstate and post-road laws, I cannot appreciate upon what principle it consented to repair the injury done to the streets in the erection of its poles in such streets. If the Federal Constitution and laws guaranteed to it the right to use such streets, it could not be required to constantly keep on deposit with the city treasurer a sum sufficient to cover the expenses of repairing damages to the streets by the erection of its poles. It seems to me, if this contention means anything in this connection, it leads the mind to the unavoidable conclusion that the defendant itself knew that it acquired no right to the use of the streets of the City of St. Louis by virtue either of the interstate or post-road laws of the United States.

I have been unable to discover the bearing that § 3, chapter 15, article 1, Revised Ordinance, City of St. Louis, which requires the owner of abutting property to keep the sidewalks in repair, and authorizes the street commissioner to have the work done in the event the owner so fails, and to charge the cost thereof as a special tax against the abutting property, has upon the question involved in this case, and therefore respectfully submit this contention without further discussion.

VI.

THE PAYMENT OF GENERAL TAXES DOES NOT AFFECT IN ANY MANNER THE QUESTION INVOLVED IN THIS CASE.

The defendant paid taxes amounting to a few dollars each year on its personal property in the City of St. Louis. The nature of the personal property on which such taxes were paid is not disclosed in the tax bills. We may properly assume that it covered only office furniture and such like personal property. This assumption is not a violent assumption. The total valuation of the personal property on which taxes were paid for the year 1884 was only $1,630. It is asking too much of human credulity to believe that all of the 1,509 telegraph poles in the City of St. Louis, with the necessary wires and paraphernalia for carrying on a telegraph business, then located in the City of St. Louis, was only worth $1630.00. This item must, therefore, have covered only office furniture and the like. This conclusion is strengthened by the fact that defendant showed that during the same year the State board of equalization assessed its property for State, school and city taxes at a valuation of $17,064.53. Neither of these assessments covered the use by the defendant of the streets of the City of St. Louis. The State board of equalization, in fixing the value of defendant's property, had no power to take into consideration such use by defendant of the streets of the city, and certainly could not assess such use for State taxation, for the reason that the State had no manner of interest in such use, nor under the Con-

stitution of the State could the State exercise any control over such use.

Manifestly, therefore, neither the payment of taxes on personal property nor the payment of the amount assessed by the State board of equalization covered the use of the streets of the City of St. Louis.

VII.

THE ORDINANCES UNDER WHICH THIS PROCEEDING IS HAD ARE REASONABLE AND JUST.

It is so manifestly proper that every person should pay a reasonable compensation for benefits received, whether from his fellow-man or from the State, or a political subdivision thereof, that it has become axiomatic, not only in law but in good conscience. Defendant in error has received a benefit from plaintiff in error and should be compelled to make just return for the same. In conferring this benefit plaintiff in error is at constant expense in the way of keeping up the streets. It has a right, therefore, as a public trustee, to exact reasonable remuneration for the benefits conferred. Otherwise the revenues raised by general taxation must be expended for the benefit of persons who do not contribute thereto, and residents will be charged for the use of streets, while non-residents, who continually occupy large portions of the same, will bear no burden of keeping up the same. This is all this ordinance seeks to provide for.

VIII.

THE POWER OF THE CITY TO LICENSE, TAX AND REGULATE TELEGRAPH COMPANIES WAS NOT TAKEN AWAY BY IMPLICATION BY THE ACT OF THE GENERAL ASSEMBLY OF MISSOURI, APPROVED APRIL 21ST, 1877.

It will be remembered that the city was given power by paragraph 5 of § 26 of article 3 of its charter: "To license, tax and regulate * * * telegraph companies or corporations, street railroads cars, etc."

The Act of the General Assembly of Missouri, approved April 21, 1877 (being § 6901, Revised Statutes, Missouri, 1879), simply prescribed, among other things, that all the property, real and personal, including the franchises owned by telegraph and express companies, should be subject to taxation for State, county, municipal and other local purposes, to the same extent as the property of private persons, and the taxes levied thereon should be levied and collected in the manner then or thereafter provided by law for the taxation of railroad property in the State.

This act in nowise took away from the city the power derived through the Constitution of the State of Missouri from the people of that State to tax telegraph companies for any purposes other than those for which railroad companies could be taxed under the revenue laws of that State. No railroad company in the State of Missouri, whether lying wholly within that State or partly within and partly

without that State, would contend for a moment that, because it had paid general taxes under the revenue laws of the State, it was therefore entitled to use, occupy and enjoy a part of the domain owned, controlled and kept up exclusively by the City of St. Louis, without being liable to the city for compensation for such use. The law-maker never intended the Act of 1877 to have the effect of taking away, by implication, or otherwise, from the City of St. Louis, the right to tax telegraph or telephone companies for the use of its streets. The power of the city to tax of course is derived from the higher sovereignty of the State, but it was granted to the City of St. Louis in such an unusual and solemn form that it ought not to be hastily or readily declared taken away from the city. Repeals by implication are never favored in law. Because the State of Missouri prescribed that general taxes should be assessed and collected in a particular way does not force the mind to the conclusion that the express power conferred upon the City of St. Louis by its charter was thereby intended to be taken away. Especially is this true when the tax is applied to something not covered by the said assessment.

A full and careful consideration of the propositions involved in this case has led me to the conclusion that its merits were not decided by the lower court, and that the right of the city to recover the amount here sued for cannot, successfully or logically, be controverted, upon any of the grounds

set up in the defendant's answer, or assigned for the judgment of the court below.

I therefore respectfully ask that the judgment of the Circuit Court herein be reversed, and that the case be remanded to said court with directions to enter judgment for the plaintiff in the sum of $22,-635, with interest at the rate of six per cent. per annum from the 7th day of April, 1888.

Respectfully submitted,

W. C. MARSHALL,

Attorney for Plaintiff in Error.